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THE IMPLIED COVENANT OF DILIGENT OPERATION
AND THE NONASSENTING LESSOR
IN SECONDARY RECOVERY OPERATIONS

Arthur B. Custy

UNIFORMITY, FORGED INDORSEMENTS,
AND COMPREHENSION–SOME OBSERVATIONS
ON THE UNIFORM COMMERCIAL CODE FOR MISSISSIPPI

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THE IMPLIED COVENANT OF DILIGENT OPERATION AND THE NONASSENTING LESSOR IN SECONDARY RECOVERY OPERATIONS

*Arthur B. Custy**

I. Introduction

On October 27, 1941, The Supreme Court of Mississippi in its decision in *Lloyd's Estate v. Mullen Tractor and Equipment Company*[1] recognized that there were in force throughout Mississippi a great number of oil and gas leases whose validity might depend upon the decree it would enter in the case then under consideration. In recognizing this fact the court deciding not to dispose of the suit as having been brought prematurely, said, "[W]e deem it both expedient and proper at this time, when the oil and gas industry in this state is still in its infancy and precedents are few wherein these considerations have been involved in the construction of contracts of this specific nature, that we should determine the validity of this particular lease in the light of those questions which are urged as grounds for its alleged invalidity." A period of more than twenty years has elapsed since *Lloyd's* case was decided. Indeed, the oil and gas industry in Mississippi was a mewling infant in 1941—but much, much water has gone over the dam in the ensuing years.

Since 1941, over 125[2] cases involving oil and gas matters primarily have been decided by our Supreme Court. Each of these decisions has contributed to the growing body of the law of Mississippi in the oil and gas area. Among these decisions, however, there are only a few[3] which consider the problem of implied covenants, although our sister states have had the problem before their courts on many occasions.

A brief sketch of the geological background of the occurrence of oil and natural gas in nature will facilitate a further discussion of this problem. These minerals are found in porous rocks and are confined with-

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*Professor of Law, University of Mississippi. An address delivered before the Mississippi Oil & Gas Lawyers Association, Jackson, Mississippi. March 1961.

[1]192 Miss. 62, 75, 4 So. 2d 282, 284 (1941).

[2]10 Miss. Dig. *Mines & Minerals* §§ 1-125 (Supp. 1963).

[3]Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954); Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So. 2d 344 (1950); Lloyd's Estate v. Mullen Tractor & Equip. Co., 192 Miss. 62, 4 So. 2d 282 (1941). See also Pressler, *Implied Covenants in Oil and Gas Leases*, 18 Miss. L.J. 402 (1947); Thomas, *Non-Development of Oil and Gas Leases*, 20 Miss. L.J. 304 (1949); Walker, *Express Clauses in Oil and Gas Leases Affecting the Usual Implied Obligations of the Lessee*, 13 Miss. L.J. 292 (1941).

in a trap.[4] The minerals remain under pressure supplied by superimposed rock, the gas, and, occasionally, by water. Natural gas itself is a form of oil. In the primary production of the mineral when the impervious layer of rock overlying the mineral is penetrated by a drill the oil is forced to the surface and a flowing well results if sufficient pressure is present. As the oil comes to the surface the lifting power of the gas is gradually dissipated since it is produced simultaneously. When the pressure decreases to the extent that the gas can no longer lift the oil, steps are taken by the use of gas or air lifts or pumps to produce the oil. When that pressure no longer can produce the oil, abandonment may be indicated; a substantial quantity of oil, however, remains unrecovered. A flowing well, or one producing by virtue of the use of pumps, gas or air lifts which produce the oil under natural pressure, is considered a *primary recovery operation.* In order to recover oil which remains in the structure when primary operations are ineffective, *methods of secondary recovery* are indicated. These methods include the introduction of gas or air, under pressure, into input wells in the reservoir and water-flooding, which forces the oil in front of it to the producing wells. Some of the secondary recovery methods may be used while the reservoir is in primary operation; their early introduction may bring about recovery of a greater quantity of oil and give the entire reservoir a much longer life.[5]

Unfortunately, when the Lord made the world He paid scant attention to the location of surface property lines in relation to the mineral deposits underlying them. As a result, the oil and gas reservoirs ordinarily lie beneath a myriad of mythical boundary lines on the surface whose location and validity in turn are subject to a tremendous body of property law.

II. Adjusting Rights of Surface Owners in the Reservoir

In Mississippi one of the problems of primary concern is equitable adjustment of the rights and duties of the parties interested in producing gas and oil from an entire reservoir by unit operation instead of developing each lease as a completely separate and distinct operation, totally independent of the reservoir as a whole. The state is an interested party[6] in that it has a sovereign duty to conserve natural resources. Indeed, many states have actively undertaken by appropriate legislation

[4]Merrill, *Implied Covenants and Secondary Recovery,* 4 Okla. L. Rev. 177 (1951). For an excellent elementary discussion of the scientific and engineering background of oil and gas law see: Williams, Maxwell & Meyers, Cases on Oil and Gas 1-12 (1956). See also Huie, Walker & Woodward, Oil and Gas (1960).

[5]Myers, The Law of Pooling and Unitization—Voluntary—Compulsory (1957); See Merrill, *supra* note 4, at 178-80.

[6]Miss. Code Ann. § 6132-01 (1956).

to enforce reservoir development under prescribed circumstances.[7] Individual lessors have executed leases which contain expressed provisions permitting their lessees to unitize the leased premises for development. Voluntary agreements are executed by all parties where unit operations are indicated, and indeed, these type agreements are encouraged by the sovereign and made the subject of special protective legislation to insulate them from the effect of antitrust laws.[8]

Frequently, however, there are situations which occur when the lessee, having based his decision upon sound engineering principles and motivated by duties implied by law rising out of the oil and gas lessor-lessee relationship, will present an agreement for unitized operations to a lessor; and the lessor will refuse to execute the agreement. It appears when this occurs that public policy is frustrated, the burden imposed upon the lessee to represent the rights of the lessor is frustrated, the duty imposed upon the lessee to adopt an approved method for secondary recovery is frustrated; and the duty imposed upon the lessee to develop the leased premises so long as the enterprise can be carried on at reasonable profit is frustrated. Furthermore, when the lessee presents a fair and reasonable plan for unitization to the lessor, as measured by the mythical prudent operator test, having in mind both the best interests of the lessor and the lessee and including a just and fair formula for allocation of royalties, refusal on the part of the lessor to sign is frustrating and finally, the correlative rights of all of the signatories of the unit plan are frustrated.

Implied covenants are said to be obligations resting upon the owner of a working interest in favor of non-working interests.[9] They represent obligations concerned with development and operation which the courts have imposed upon the owners of the working interests and in favor of the proprietors of other interests who expect production income from the leased premises.[10] Implied covenants appear to have their basis in the principle applied by courts in which two parties are associated in a venture on terms which subject the return to one to the diligence, skill and faithfulness with which the other performs.[11] Covenants of this character appeared in the latter part of the nineteenth century in a number of solid mineral agreement cases,[12] but it was not until 1896,

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[7]Myers, *op. cit. supra* note 5, at 216-26; Alaska, Arkansas, Florida, Georgia, Louisiana, Nevada, Oklahoma, Washington.

[8]Miss. Code Ann. § 6132-22 (1956).

[9]Merrill, *Implied Covenants in Oil and Gas Leases*, 1959 U. Ill. L.F. 584-601.

[10]Merrill, Covenants Implied in Oil and Gas Leases 22 (2d ed. 1940, Supp. 1959) [hereinafter cited as Merrill].

[11]Merrill § 218.

[12]Iron: Cowan v. Radford Iron Co., 83 Va. 547, 3 S.E. 120 (1887). Stone: Watson v. O'Hern, 6 Watts 362 (Pa. 1837). Gold, Silver, Other Minerals: Maxwell v. Todd, 112 N.C. 677, 16 S.E. 926 (1893); Merrill § 218.

in Pennsylvania, that an implied covenant was enforced against a lessee in an oil and gas relationship.[13] The development of the implied covenant since the turn of the century has been, in the great majority of cases, in oil and gas operations. These covenants have been stated and developed until we now have substantial agreement among the text writers with respect to their number and nomenclature. Professor Merrill, the leading authority in the field of implied covenants, limits them to four and classifies them as follows: (1) exploration; (2) further development; (3) diligent operation, including marketing, and (4) protection against drainage.[14] These implied covenants are all applicable under the facts giving rise to their presence and are enforced against lessees and in favor of lessors in the primary operations for recovery of oil and gas.[15] The prudent operator standard of compliance is now regarded as the test of whether or not the lessee had complied with the obligations imposed upon him by the implied covenants.[16] Detailed treatment of any one of the implied covenants would be beyond the scope of this paper. No more discussion of these covenants will be included except insofar as they have a direct bearing on the particular problem under consideration.

What is the effect, then, of unitization upon the implied covenants? Pre-existing oil and gas leases, including their expressed and implied covenants, remain in full force and effect after their inclusion in a unit, except in so far as the particulars are modified by the terms of the unit agreement.[17] Expressed and implied duties of the lessee to develop the individual lease is superseded by the obligation to develop and operate the unit of which the lease is a part.[18]

III. Remedies of a Lessee Against a Non-assenting Lessor

Proceeding on the theory that more efficient exploitation and development of oil and gas resources and greater total recovery will result if there can be cooperative rather than competitive development of an

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[13]Kleppner v. Lemmon, 176 Pa. 502, 35 Atl. 109 (1896).

[14]Merrill § 4; Brown, Oil and Gas Leases 270-74 (1958); Meyers, *The Implied Covenant of Further Exploration,* 34 Texas L. Rev. 553 (1956); Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts,* 3 U.C.L.A.L. Rev. 508 (1956); Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas,* 11 Texas L. Rev. 399, 401 (1933).

[15]Merrill § 3.

[16]Merrill § 122.

[17]Merrill, *supra* note 9, at 601: "The valid establishment of an operating unit, whether by agreement or by force of law, supersedes the operation of the implied covenants in so far as they involve the individual development, operation, and protection of the several tracts within the unit."

[18]Myers, *op. cit. supra* note 5, at 364; Merrill § 227.

oil field,[19] what is the legal situation of a lessee who desires to execute a unit agreement and cannot obtain the assent of his lessors to participation in the unit operation, in a state which has no compulsory unitization legislation? At the outset, it is to be noted that practically all of the authorities are in agreement that the practiability of unit operation depends on the consent of the lessors.[20] There is no doubt that lessees may bind their own interests but it appears that their lessors may not be controlled by the agreement.[21] Furthermore, where secondary recovery methods may be applied to a leased tract as a separate, independent unit, the duty of the lessee is clear; he would be less than diligent if he did not use secondary recovery methods—he may, in fact, be liable to his lessor for breach of the implied covenant of diligent operation.[22] May a group of lessees by unilateral action employ secondary recovery methods without the consent of their lessors? The problem which is raised here is one which involves a transfer of the duties of the lessees from their individual lessors to the unit, with respect to management and operation of the independent leases. The possibility is good that oil may escape to other tracts or the danger of injury to the producing sands is present. As the law presently exists, each owner may enforce the development of his land as a unit.[23] He is also entitled to receive his royalty upon the oil coming from beneath the land.[24]

The lessee is required to exert all reasonable efforts to secure the greatest production of which his land is susceptible.[25] The lessee must exercise the diligence of an ordinarily prudent operator to make certain that the oil which the lessee should recover is not drawn off by operations on adjacent tracts.[26] It seems apparent that unitization even in a relatively simple unit plan may necessitate the drilling of fewer wells than would be drilled if the field were developed independently, and thus the lessee might incur liability for breach of the implied covenant to develop the leased premises.[27] It appears that the lessee may not

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[19]King, *Pooling and Unitization of Oil and Gas Leases,* 46 MICH. L. REV. 311 (1948).

[20]Merrill, *supra* note 9, at 599; Merrill, *supra* note 4.

[21]Dobson v. Arkansas Oil and Gas Comm'n, 218 Ark. 160, 235 S.W.2d 33 (1950); Union Oil Co. v. Touchet, 229 La. 316, 86 So. 2d 50 (1956); Corley v. Mississippi State Oil and Gas Bd., 234 Miss. 199, 105 So. 2d 633 (1958). See also Hood v. Southern Prod. Co., 206 La. 642, 19 So. 2d 336 (1944); Knight v. Chicago Corp., 144 Tex. 98, 188 S.W.2d 564 (1945).

[22]MERRILL §§ 72, 83; Merrill, *supra* note 9, at 600; Merrill, *supra* note 4, at 181.

[23]Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S.W. 837 (1911).

[24]Ortiz Oil Co. v. Geyer, 138 Tex. 373, 159 S.W.2d 494 (1942).

[25]State *ex rel.* Shell Petroleum Corp. v. Worden, 44 N.M. 400, 103 P.2d 124 (1940); Ezzell v. Oil Associates, 180 Ark. 802, 22 S.W.2d 1015 (1930).

[26]Petroleum Producers Co. v. Steffens, 139 Tex. 257, 162 S.W.2d 698 (1942).

[27]Dillard v. United Fuel Gas Co., 114 W. Va. 684, 173 S.E. 573 (1934).

place structures on a non-consenting lessor's land which have no connection with the operation of that lessor's premises, even though they may constitute part of the unit plan.[28] The lessee, in absence of lessor's consent, may not conduct his operations in a manner which will force away the minerals from the premises, although such operations may be within the unit plan.[29]

In 1949, a federal court in Illinois decided *Ramsey v. Carter Oil Company*.[30] Carter desired to convert an offset well into a gas repressuring well. It was undisputed that such a conversion would force oil from under five acres of the lessor's land onto the land of another and therefore would be lost to the lessor. The court decided the case in favor of the lessor and granted injunctive relief. Statements made in *Ramsey* are rather curious in the light of the result reached. The court recited that: (1) Implicit in the lease is an obligation on the part of the lessee to use reasonable diligence to develop the premises so long as the enterprise can be carried on at a reasonable profit; (2) implied also is a covenant that the lessee will, by appropriate measures, protect the leasehold against drainage by offset wells; and (3) it would seem that a reasonably prudent operator bound to produce oil by approved methods has the right *implied in an oil lease to adopt proper gas repressuring systems for secondary recovery of oil.* It would seem that he is under the same duty to do so as he is to drill offset wells. Carter, as a prudent operator, had a right to adopt any approved method of repressuring for secondary recovery; the use of gas is one of the approved methods. The court then asked whether the proposed method and plan of Carter can be said to be that of a reasonably prudent operator having in mind the rights of the lessors. Furthermore, the court affirmatively stated that Carter had only one right under its lease and that was to remove the oil according to approved methods for the benefit of itself and its lessors. Carter had argued that the lessors would receive more oil from the remaining portion of their land and additional oil would come their way because of migration from other areas. All of these contentions were answered by the court when it said that these arguments do not alter the "property" rights of the lessors. They have a right to have their oil left in place until and unless repressuring can be done by a plan which will preserve to them all their oil as well as increase the production from the remaining land. It regarded as conjecture the argument that the oil would be replaced by other oil.

The case, in many respects, presents a situation where the implied covenants are in apparent conflict. The duty to develop the property and produce the oil in a manner a reasonably prudent operator

[28]Franz Corp. v. Fifer, 295 Fed. 106 (9th Cir. 1924).
[29]Ramsey v. Carter Oil Co., 74 F. Supp. 481 (E.D. Ill. 1947).
[30]74 F. Supp. 481 (E.D. Ill. 1947).

would employ is extended to include the secondary recovery of oil; the lessee having due regard for his own and lessors interests. Why, then, if a covenant is implied in the lease to require the lessee to adopt approved methods of secondary recovery is the same not enforceable against the lessor? *Carter Oil Company v. Dees*,[31] an Illinois case decided by the Appellate Court of Illinois three years after *Ramsey*, may shed some light on the problem. In this case, Carter sued, by a declaratory judgment proceeding, to have itself declared entitled to convert an offset well on the defendant's premises into a gas input service well. Production from four wells had declined from 200 to six to ten barrels per day. The decline in production was the result of the depletion of the gas energy. Carter desired to adopt an approved gas injection procedure for secondary recovery, and such plan would be the plan adopted by a prudent operator, having in mind the best interests of the lessors as well as the lessees. In the plan, Carter had converted one of its other wells located on lands not owned by the lessors into a gas input well and the operation of this well was causing oil to migrate onto the present lessor's lands. In deciding that Carter was entitled to a declaratory judgment under the facts, the court made a number of observations. Initially the court determined that nothing was accomplished by a mere assertion that the lessors have title to all the oil in place. The lessors had conferred the right to remove and dispose of the oil on the lessee by contract. The court addressed itself to the question then: What rights did the admitted owners confer upon the lessee as to the oil they owned; and what are the lessees' obligations? Lessor's assertions of title were considered irrevelant since the principle with which the court was concerned was whether the operations were contrary to the manifest intention of the parties in that the primary purpose of the lease was defeated; that is, the royalty reserved to the lessors. The lease, of course, was silent with respect to the process to be employed in recovering the oil. The court observed that it would violate fundamental principles of construction to insert by implication a provision that the lessee was limited to the use of means of production which involved primary operations. The court was concerned with the problem of drainage since the well to be used as an input well was an offset. The court observed that the lessee was seeking to attain maximum production while the lessors objected to this and, at the same time, admitted there would be far more oil for both parties. Lessors argued that lessee must use diligence in development and also attempted to use the argument of diligent development to curtail production operations. The court then held that the lessee should do what a prudent operator, using reasonable diligence, would do, having in mind the best interests of the lessor and lessee. Since this rule is applied to determine whether

[31] 340 Ill. App. 449, 92 N.E.2d 519 (1950).

an operator is obliged to establish an offset well, it should be applied in deciding whether the operator shall be required to *maintain* it, or be permitted to discontinue it.

In *Reed v. Texas Company*,[32] a decision rendered by the appellate court of Illinois in 1959, owners of oil rights had sought to enjoin the Texas Company and others to discontinue a repressuring program which consisted of forcing water, under pressure, into the oil pool to increase the flow of oil from producing wells. Texas Company was the operator of the pool and answered the complaint by asserting that the secondary recovery operation was lawful and without it the royalty owners would suffer great financial loss. Reed argued that the secondary recovery operation forced the oil to which they had title to flow to wells owned by others, and since the owners had not consented to unitization of the field, it was not a legal operation. The lower court heard testimony of engineers who were experts in the science of oil producing and received a mass of statistical data in evidence concerning the physical condition of the pool and the production history of each and every well drilled in the pool. The development of the South Aden Pool in Wayne County, Illinois began in the thirties, and by October of 1938 production was about 600 barrels per day. Thereafter, the decline in flow from existing wells and the drilling of new wells caused this figure to fluctuate. However, the general trend was upward and the total production from the whole field in November of 1943 reached about 1,250 barrels per day. For the following five years the trend was downward; in 1948 production from the pool fell to 275 to 280 barrels per day. Some of the wells were profitable but others were at the point of no return. Production from one of these wells on a leasehold also owned by Reed decreased to a rate of about one barrel per day. This particular well had been in operation for about three years but had not had production enough to pay its own cost. The experts agreed that no method known will serve to recover all of the oil in place; but repressuring can serve to recover a great deal of the oil; and it is a matter of common knowledge that repressuring has been used in abandoned fields, sometimes to produce more oil by the secondary recovery method than the total recovered in primary production. During the declining period of the South Aden Pool, Texas sought to use secondary methods under a unitization agreement. This agreement would permit operation of the field as a unit with total production allocated among leases according to a fixed ratio, regardless of which wells were actually producing. Under the unitization plan the operator could inject gas, water or other fluid at one edge of the pool, and as succeeding rows of wells allowed escape of the pressure without profitable quantities of oil, those wells could be capped or converted

[32]22 Ill. App. 2d 131, 159 N.E.2d 641 (1959).

to input wells. The court observed that, in effect, the oil was swept from the pool so that the profitable production was on the opposite side of the pool, but royalties are paid according to the agreed ratio. One of the plaintiffs refused to enter such an agreement to unitize and this effectively blocked unitization of the entire pool. Texas Company was faced with the continued downward trend in production, coupled with the fact that the wells were producing large amounts of salt water. The salt water could not legally be disposed of by allowing it to run off in streams to the damage of other land, so it was necessary to dispose of it on the leaseholds. This was an increasing operation expense in spite of the decline in production which reached only 22% of the maximum attained in 1943. In 1946, Texas experimented in the disposition of the water by pumping it back into the underground reservoir under pressure. It was not until 1948 that pressure began to have a noticeable effect and production began to rise. Texas engineers then put into operation a repressuring system without unitization. This system involved placing injection wells around the periphery and others in the interior area of the pool. The wells placed in the interior area of the pool were spotted as close to boundaries of leaseholds as was practicable, so as to diffuse the pressure and minimize the migration of oil from one leasehold to another. A substantial rise in production was noticed in 1949. Subsequent additional wells were added to the injection system from time to time to maintain pressure and to equalize the ratio of production from the several leaseholds with the ratio that existed during primary production. This upward trend in production continued until the latter part of 1955, when it reached a peak of 1350 barrels per day, thus surpassing the peak production under primary production. Thereafter, production again declined and by September of 1957 the pool was down to an average of 450 barrels per day. Such a detailed account of the facts in the *Reed* case is necessary to indicate the serious results which would develop from an injunction prohibiting a repressuring program. Apparently there was no conflict in the evidence with respect to these facts.

Reed asserted that repressuring could not be used except under a unitization contract. Apparently no authority for such a view existed in Illinois. The court considered *Ramsey v. Carter Oil Company* and *Carter Oil Company v. Dees*, which have been previously examined, and said that in both of those cases there was objection to the use of secondary methods of production and in neither was there any unitization agreement. However, the courts which decided these cases held that "it was an implied right, and even a duty, for a reasonably prudent operator to adopt a repressuring system for the secondary recovery of oil."[33] In the *Ramsey* case the court felt that the plan was disapproved

[33] 159 N.E.2d at 644.

because there was testimony that the method then in use was driving off commercial quantities from the lessor's land to others. There was also testimony in *Ramsey* that Carter Oil Company proposed to remedy this by causing other oil to be driven back in equal amount, but that court rejected this testimony as conjectural. In the *Dees* case it was stipulated that the company's plan would result in driving oil into the leasehold equal to that driven off, and it was therefore held that the plan was reasonable and proper and, there being no damage resulting, could be put into effect. A most significant statement in the *Reed* case is as follows:

> If a minority of one or more persons affected by the operation could prevent it by refusing to join in the agreement, they could then force the others to choose between leaving a large part of the oil or consent to granting the dissidents an unreasonably large percentage of the oil. In other words, the power to block a repressure program by refusing to sign the unitization agreement would be the power to insist upon unjust enrichment. Surely a court of equity should not support such a rule.[34]

Reed argued also that as owners of the land on the surface they had "title" to the oil underlying it. In answer the court cited *Dees* as authority for the proposition that discussion of questions of title to the oil was irrelevant; that this was clearly the modern trend of authority. The court stated that an operator must be reasonably diligent to prevent waste and to prevent any substantial loss of oil, but that the absolute prevention of any movement of oil underground across a boundary line is not humanly possible and if the oil moving off one lease is compensated for by a substantially equal amount from the same pool, there is no actual loss. The unitization plan adopted by Texas had been approved by the Mining Board of Illinois and the court affirmed the decree of the chancellor denying the injunction.

Tide Water Associated Oil Company v. Stott[35] was decided by the Court of Appeals for the Fifth Circuit in 1946. This suit was brought by oil and gas lessors for damages to their leases, allegedly resulting from Tide Water's recycling operations on neighboring lands. Tide Water had essentially all of the property of the Stott leases and also leases surrounding the lands of appellees on three sides. In 1939, two operators in the common pool commenced recycling operations and in that same year, Tide Water adopted the practice. In order profitably to conduct recycling operations it was necessary to unitize or pool tracts of substantial size; therefore, in mid-1939 Tide Water approached appellees with various proposals for unitization of their tracts with other lands and to have appellees participate in the recycling operations on

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[34] *Ibid.*

[35] 159 F.2d 174 (5th Cir. 1946), *cert. denied,* 331 U.S. 817 (1947).

the same basis as the royalty owners of other tracts subject to Tide Water's leases. Negotiations were carried on in good faith but Stott declined to unitize and participate on this basis. Tide Water then drilled a well on each of the three tracts involved and produced all of the oil that could be produced and all of the gas for which there was a market. The royalties on these products were paid to Stott. Recycling operations were not practicable on any one of these tracts alone, so Tide Water operated the wells on the three tracts, extracting condensate in separators at the well and sold the remaining semi-dry gas. Under the recycling operations conducted on all other leases held by Tide Water, the wet gas was produced from withdrawal wells, processed through a gasoline plant and the remaining dry gas was returned under pressure through injection wells to the common reservoir. The higher pressure of the dry gas at the injection wells forced the dry gas toward the points of lower pressure at the withdrawal wells. The dry gas spread and the wet gas was withdrawn until the field became a dry gas field, no longer useful for production of liquid petroleum products. Stott sued to recover damages from lessees to the extent of the royalty fraction of condensate which might have been removed from the wet gas under their lands, and which now had been replaced by dry gas as a result of the recycling conducted upon other leases in the field. The trial court concluded that Stott had been damaged to the extent that the wet gas under his lands had been replaced by dry gas and gave judgment accordingly. The Fifth Circuit, speaking through Judge Lee, observed that the implied covenant to protect from drainage does not impose an insurer's liability upon the lessee and that a reasonable and prudent operator would not have drilled an additional well upon any of appellees three tracts. Tide Water had produced all of the mineral products which could be produced in the absence of recycling and recycling was not practicable in the absence of unitization which the lessors had refused. Tide Water, therefore, had fulfilled its implied covenant to protect the premises from drainage. Stott argued that there was an additional implied covenant obligating the lessee not to injure the lessor's lease and took the position that even though the lessees may not be liable under the implied covenant to protect from drainage, they are liable because the drainage has been effected through operations by the lessees themselves on other premises. The court answered this by concluding that if a reasonable and prudent operator would not have drilled an additional well on the leased tract, the lessors could not have recovered damages from the lessees for draining the leased tract from adjacent premises.[36] The plan offered by Tide Water to Stott for unitization of the leased premises and participation in the recycling operations was found to be reasonable and fair and Tide Water

[36]*But see* Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So. 2d 176 (1954).

had amply fulfilled any duty of fair dealing which may have arisen from the lessee-lessor relationship. Since the lease did not authorize unitization, Stott was entitled to refuse to unitize, but Tide Water was not, by virtue of such refusal, precluded from operating and was within its rights in proceeding to operate its other leases to the best interests of both lessee and lessors. The court said,

> In short, the appellees may not refuse to cooperate with their lessees for their mutual protection in the adoption of the practicable customary method or plan universal in the Long Lake field offered them by appellants, and at the same time assert and demand damages. The contention of the appellees in such situation is both unique and untenable. Any damage which they suffer is damnum absque injuria and in nowise are such damages chargeable to appellants.[37]

The court observed that Stott could correct the situation for the future by participating in recycling operations on the same basis as other royalty owners in the field. The judgment was reversed and the cause remanded.

Phillips Petroleum Company v. Peterson,[38] decided in 1954 by the Court of Appeals for the Tenth Circuit is interesting, not for the result reached which was, in fact, based upon authority to unitize contained within the original lease, but for representative statements of law made by that court in reaching its decision. The court said,

> A lessee is bound by implied covenants in the lease to diligently explore and develop the lease, and to do so under a fair unitization plan, if unitization is effected; to market the production if the oil and gas is found in paying quantities; to do that which an operator of ordinary prudence, having due regard for the interests of both the lessor and the lessee, and, in case of unitization, to act fairly and in good faith, with due regard for the lessors' interests, and to provide for a fair apportionment of the oil produced. The lessee clearly may not act arbitrarily or capriciously.[39]

The Mississippi Supreme Court decided the case of *Corley v. Mississippi State Oil and Gas Board*.[40] Here, eight appellants protesting promulgation of certain rules proposed by appellee, Gulf Oil Corporation, were respondents before the Oil and Gas Board. The appellants had also proposed certain rules. After a hearing, the Board adopted amendments to special rules for the Soso Field. With reference to

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[37]Tide Water Associated Oil Co. v. Stott, 159 F.2d 174, 179 (5th Cir. 1946), *cert. denied*, 331 U.S. 817 (1947).

[38]218 F.2d 926 (10th Cir. 1954).

[39]*Id.* at 934.

[40]234 Miss. 199, 105 So. 2d 633 (1958).

spacing, the rules were substantially those proposed by Gulf, but the Board did not adopt the allocation formula proposed by either side. The protestants appealed to the circuit court but Gulf took no cross appeal. On appeal, the supreme court was concerned with the validity of the special field rules of the Oil and Gas Board with reference to the size of spacing units in the field where practically all of the royalty owners and operating owners had signed a voluntary unitization of their interests in the oil pool. The issues appeared to be whether the 1957 amendments to the special field rules were within the statutory powers of the Oil and Gas Board and whether they were supported by substantial evidence. The supreme court affirmed and held that the reduction in allowable per surface acre and the redefinition of the field were within the Board's statutory powers, and its actions were supported by substantial evidence. Reading the conservation objectives of the act together with the powers vested in the Board, and considering them in the light of the evidence of the case, the court decided that it would be neither fair nor equitable to permit a very small minority of small fractional owners in the common source of supply to prevent the Board and the overwhelming majority of operating and royalty owners from pursuing a unitization program designed to obtain a maximum recovery from the field. It is to be noted that the court in this case specifically stated that the case did not involve any question of compulsory unitization of an entire oil field or pool. The Oil and Gas Board approved and utilized the voluntary unitization agreement in designating the fieldwide unit, but it carefully protected the rights of the few owners of small fractional interests within the individual units who did not sign the unitization agreement. The court cited *Dobson v. Arkansas Oil and Gas Commission*[41] with approval for the proposition that a lessor cannot refuse to enter a unitization agreement and expect to benefit from it. The court also cited the *Tide Water Associated Oil Company v. Stott* case for the proposition that the lessees had fulfilled any duty of fair dealing which they owed the lessors by offering them the right to unitize and to participate, and that the lessors could not refuse to cooperate with the lessees for their mutual protection and at the same time assert and demand damages. The reasoning in the *Dobson* case and the *Stott* case, the court observed, was sound and a pertinent answer to the contentions of the respondents.[42]

These cases shed some ray of light and more hope on the problem of the usefulness of the implied covenant in secondary recovery operations in dealing with the non-consenting lessor.

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[41]218 Ark. 160, 235 S.W.2d 33 (1950).

[42]Corley v. Mississippi State Oil & Gas Bd., 234 Miss. 199, 217, 105 So. 2d 633, 640-41 (1958).

IV. Conclusion

In summary, it appears that under the presently existing law consent of the lessors is a necessary prerequisite, in the absence of statute, before unit operations may be employed.[43] Where the lessor chooses to withhold his consent he may resort to his remedy for breach of covenant against the lessee,[44] but if the lessor will receive oil substantially equal to the amount which is forced from under his land, he will not be hurt.[45]

A lessee is bound by covenants implied in the lease to explore diligently and develop the lease, and to do so under a fair unitization plan, if unitization is effected;[46] and he must offer his lessor an opportunity to participate in the plan upon reasonable terms.[47] The lessee may be liable for breach of implied covenant if he failed to offer such a plan for development to his lessor, regardless of whether or not the lessor consents, if the unit operation injures the lessor.[48] It is conceivable that the lessor might compel his lessee to join in a reasonable plan for unitized operation designed to bring about total recovery.[49] Frequently, a unit operation will benefit all who participate, even as compared with the returns to some of the landowners where the leases are operated independently.[50] Unless his substantial rights are affected, a lessor, refusing to consent to a unit plan containing reasonable and undiscriminatory terms, appears to have no claim against his lessee for injury to his excluded land which results solely from proper operation of the unit.[51]

Do the cases reveal any evidence of a trend in the law of implied covenants in this area? There is much to be said for the argument that the lessor himself is obligated by implied covenant voluntarily to unify his interests when the lessee may be compelled by the lessor to join a reasonable plan for unit operation. In the light of the burdens

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[43]Merrill, *supra* note 9, at 599; Merrill, *supra* note 4.

[44]Ramsey v. Carter Oil Co., 74 F. Supp. 481 (E.D. Ill. 1947).

[45]Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (1950).

[46]Phillips Petroleum Co. v. Peterson, 218 F.2d 926, 934 (10th Cir. 1954).

[47]Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), *cert. denied*, 331 U.S. 817 (1947); Merrill, *supra* note 4, at 188.

[48]See also Ross v. Damm, 278 Mich. 388, 270 N.W. 722 (1936); Godfrey v. McArthur, 186 Okla. 144, 96 P.2d 322 (1939); Merrill, *Unitization Problems: The Position of the Lessor*, 1 Okla. L. Rev. 119, 132-33 (1948); Merrill, *supra* note 9, at 600; Merrill *supra* note 4, at 187-88.

[49]*In re* Shailer's Estate, 266 P.2d 613 (Okla. 1954). Merrill, Covenants Implied in Oil and Gas Leases 38 n.54a (Supp. 1959).

[50]Merrill, *supra* note 9, at 600; Merrill, *supra* note 4, at 180-83.

[51]Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), *cert. denied*, 331 U.S. 817 (1947). See also Carter Oil Co. v. Dees, 30 Ill. App. 449, 92 N.E.2d 519 (1950); Dobson v. Arkansas Oil & Gas Comm'n, 218 Ark. 160, 235 S.W.2d 33 (1950).

imposed by law upon the lessee during primary operations, is it illogical, unjust, or inequitable to impose a substantially smaller burden upon the lessor to the extent of requiring him actively to cooperate in the development of the reservoir? It is submitted that the interest of the public should be paramount to both the rights of the lessee and the lessor. To apply common law property doctrine as the court did in the *Ramsay* case, is to sacrifice public policy and ignore the oil and gas lessee-lessor relationship.

Reed and *Dees* both demonstrate that courts do recognize their duty to enforce public policy. The *Stott* case is an example of the judiciary's studied consideration in recognizing that "fair dealing" is not a one-way street labeled lessee only. *Corley* has been cited for the proposition that a reduction in allowable caused by failure to join in a unit plan is defensible.[52] The lessee is obligated to develop the leased premises diligently as measured by the prudent operator standard. If he determines that a secondary recovery operation is necessary, it is his duty to present the lessor with a plan for unit operation which is reasonable and undiscriminatory. Since a unitization plan based upon the foregoing considerations is one which is designed to prolong the life of the reservoir and recover a greater quantity of the oil and gas, it is in the public interest. Such a plan would be approved by the state regulatory body as one which protects both public and private interests against waste and safeguards, protects and enforces the co-equal and correlative rights of the owners in a common source of supply and each, based upon the plan, will receive his just and equitable share of production.

It is suggested that a court may now say to the nonassenting lessor in view of the fact his lessee is carrying out the manifest intention of the parties implied in the oil and gas lease, *i.e.*, recovering the royalty reserved to the lessor, that the lessor is now under an implied obligation actively to participate in the development of leased premises as a part of the unit operation by consenting to the unit plan. Since he has been offered the opportunity to consent to the plan and has refused, his only remedy is to seek out the lessee and consent, since he cannot now be heard to complain.

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[52]Cline, *Implied Covenants—The New Look Under Conservation Laws*, 6 Rocky Mountain Mineral Law Institute 471, 488-90 (1960). The outline available on this material represents a forward looking view of the problem under consideration.

UNIFORMITY, FORGED INDORSEMENTS, AND COMPREHENSION—SOME OBSERVATIONS ON THE UNIFORM COMMERCIAL CODE FOR MISSISSIPPI

*Arthur G. Murphey, Jr.**

I. Introduction

Support for the Uniform Commercial Code has recently appeared on two occasions in the Mississippi Law Journal,[1] and this writer would like to add one more voice in support of it. However, adoption of the Code is not without its problems; and some of them at least should be mentioned. Failure to discuss short-comings by supporters could make some would-be supporters skeptical, so this writer will discuss three aspects about which people may disagree when discussing the Code. By the time this appears in print, the Code may or may not have been adopted in Mississippi. If it has been, perhaps the legislature will not have put it so completely out of mind that remedial action is difficult; for this writer has remedial action to suggest concerning one section. And it is hoped that the article may be of some value to some other state which has not yet adopted the Code, if Mississippi has.

First, mention will be made of a problem that concerns the whole Code, lack of uniformity. Following this will come an analysis of problems covered by one section in Article 4 (Bank Deposits and Collections) with suggestions for correcting an effect of the section. And finally there will be some discussion of the difficulty of working with the Code without some knowledge of commercial law. Sections in Article 3 (Commercial Paper) will be used for illustration of this last part. There are three things this writer has observed: (1) Since lack of uniformity is still a problem (even where the Code has been adopted) the proponents of the Code still have much work to do. (2) Somebody in the legislature had better look after the depositors, because nobody else will. (3) The "man on the street" would have difficulty understanding the Code (but he probably does not want to anyway—the cause of (2)).

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[1] Hanna, *The Uniform Commercial Code and Mississippi Law of Personal Property Security*, 31 Miss. L.J. 123 (1960); Witherspoon, *Prognosis of the Uniform Commercial Code*, 34 Miss. L.J. 292 (1963).

II. Lack of Uniformity

Professor Hanna in his article described how the Code is kept up to date, so there is no need to repeat the process here.[2] The latest version, the 1962 Official Text, is a reflection of how the work has been progressing. A comparison with the 1958 Official Text will show that twenty-seven changes have been made.[3] But the difference in texts is not so great as it seems, because practically all the changes were minor. When Ohio adopted the Code, its version contained seventy sections that varied from the 1958 Official Text, most of the variations so insignificant (to this writer at least) that they hardly deserve mention.[4]

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[2] Hanna, *supra* note 1, at 129-30. A more recent account appears in Schnader, *Why the Commercial Code Should Be "Uniform"*, 20 Wash. & Lee L. Rev. 237 (1963) [hereinafter cited as Schnader].

[3] Three new sections were added: §§ 4-109, 8-107, and 8-320. Four new subsections were added: §§ 4-204(3), 6-106(4), 9-103(5), and 10-104(2). In four sections there were changes consisting of deleting and adding material; §§ 3-112, 8-102, 8-208, and 8-313. Seven sections were expanded by the addition of more than one sentence: §§ 1-201, 3-105, 3-122, 4-106, 6-103, 6-104, and 9-103 (which as has been pointed out also has a new subsection). In § 9-403 a sentence was added. In § 8-306 a sentence was deleted. In § 8-308 a clause was added. §§ 6-107, 6-108, and 7-210 each had two words "or certified" added. §§ 3-412 and 3-504 each had a word "continental" deleted. And the style but not the language of § 9-401 was changed.

[4] The following sections of the Uniform Commercial Code were omitted: §§ 1-101, 1-108, 1-109, 2-101, 3-101, 4-101, 5-101, 6-101, 7-101, 8-101, 9-101, and 10-103. All but § 1-108, § 1-109, and § 10-103 are short title sections. The following subsections were omitted: §§ 1-102(5), 7-204(4), and 9-104(b). Section 9-104(b) excludes the landlord's lien from the application of Article 9. In the following sections, new subsections were added: Ohio Rev. Code Ann. § 1304.29 (Page 1962) (U.C.C. § 4-406), Ohio Rev. Code Ann. § 1306.03 (Page 1962) (U.C.C. § 6-104), Ohio Rev. Code Ann. § 1308.01 (Page 1962) (U.C.C. § 8-102), Ohio Rev. Code Ann. § 1308.19 (Page 1962) (U.C.C. § 8-308), Ohio Rev. Code Ann. § 1309.26 (Page 1962) (U.C.C. § 9-307), and Ohio Rev. Code Ann. § 1309.47 (Page 1962) (U.C.C. § 4-406), Ohio Rev. Code Ann. § 1308-01 (Page 1962) (U.C.C. § 8-102), and Ohio Rev. Code Ann. § 1309.47 (U.C.C. § 9-504). In the following sections the wording was changed: Ohio Rev. Code Ann. § 1301.04 (Page 1962) (U.C.C. § 1-104), Ohio Rev. Code Ann. § 1301.01 (Page 1962) (U.C.C. § 1-201), Ohio Rev. Code Ann. § 1302.01 (Page 1962) (U.C.C. § 2-103 to -106), Ohio Rev. Code Ann. § 1303.55 (Page 1962) (U.C.C. § 3-419), Ohio Rev. Code Ann. § 1304.01 (Page 1962) (U.C.C. § 4-104), Ohio Rev. Code Ann. § 1304.09 (Page 1962) (U.C.C. § 4-203), Ohio Rev. Code Ann. § 1305.01 (Page 1962) (U.C.C. § 5-103), Ohio Rev. Code Ann. § 1307.03 (Page 1962) (U.C.C. § 10-104), Ohio Rev. Code Ann. § 1307.22 (Page 1962) (U.C.C. § 7-307), Ohio Rev. Code Ann. § 1308.01 (Page 1962) (U.C.C. § 8-102), Ohio Rev. Code Ann. § 1308.07 (Page 1962) U.C.C. § 8-202), Ohio Rev. Code Ann. § 1308.19 (Page 1962) (U.C.C. § 8-308), ("infancy" omitted from (3)(d) making this perhaps one of the more significant changes), Ohio Rev. Code Ann. § 1308.35 (Page 1962) (U.C.C. § 8-405), Ohio Rev. Code Ann. § 1309.21 (Page 1962) (U.C.C. § 9-302) (changes here too in the "more significant" category, occurring in (A)(3), (C)(2), and (D) of the Ohio Code, or (1)(c), (3)(b), and (4) of the Uniform Commercial

There were, for instance, twenty-two typographical errors, seventeen of which were the only variation between an Ohio section and the corresponding section in the 1958 Official Text. In only two noticeable cases did this cause a change that could have been serious.[5] All but one

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Code), OHIO REV. CODE ANN. § 1309.26 (Page 1962) (U.C.C. § 9-307), OHIO REV. CODE ANN. § 1309.33 (Page 1962) (U.C.C. § 9-314) (omits the words in (A) of the Ohio Code or (1) of the Uniform Commercial Code), OHIO REV. CODE ANN. § 1309.40 (Page 1962) (U.C.C. § 9-403), (also in that part of § 1309.40 which is found U.C.C. § 9-407), OHIO REV. CODE ANN. § 1309.44 (Page 1962) (U.C.C. § 9-501), OHIO REV. CODE ANN. § 1309.47 (Page 1962) (U.C.C. § 9-504), and OHIO REV. CODE ANN. § 1309.49 (Page 1962) (U.C.C. § 9-506) (omits final clause referring to attorney's fees and legal expenses). The following sections were moved to another position in the Ohio Uniform Commercial Code: U.C.C. § 1-201 [OHIO REV. CODE ANN. § 1301.01 (Page 1962)], U.C.C. § 2-103 to § 2-106 [OHIO REV. CODE ANN. § 1302-01 (Page 1962)], U.C.C. § 2-604 [OHIO REV. CODE ANN. § 1302.62(D) (Page 1962)], U.C.C. § 2-724 [OHIO REV. CODE ANN. § 1302.97 (Page 1962)], U.C.C. § 4-104 and § 4-105 [OHIO REV. CODE ANN. § 1304.01 (Page 1962)], U.C.C. §§ 8-104(2), -302, -303 [OHIO REV. CODE ANN. § 1308.01 (Page 1962)], U.C.C. § 9-105 and § 9-106 [OHIO REV. CODE ANN. § 1309.01 (Page 1962)], U.C.C. § 9-407 [OHIO REV. CODE ANN. § 1309.40 (F) & (G) (Page 1962)], and U.C.C. § 10-104 [OHIO REV. CODE ANN. § 1307.02 (Page 1962)]. The following sections contained typographical errors: OHIO REV. ANN. § 1302.01 (Page 1962) (U.C.C. § 2-103), OHIO REV. CODE ANN. § 1302.05 (Page 1962) (U.C.C. § 2-202), OHIO REV. CODE ANN. § 1302.24 (Page 1962) (U.C.C. § 2-311), OHIO REV. CODE ANN. § 1302.53 (Page 1962) (U.C.C. § 2-509), OHIO REV. CODE ANN. § 1303.01 (Page 1962) (U.C.C. § 3-102), OHIO REV. CODE ANN. § 1303.23 (Page 1962) (U.C.C. § 3-202), OHIO REV. CODE ANN. § 1303.72 (Page 1962) (U.C.C. § 3-606), OHIO REV. CODE ANN. § 1304.09 (Page 1962) (U.C.C. § 4-203), OHIO REV. CODE ANN. § 1305.01 (Page 1962) (U.C.C. § 5-103), OHIO REV. CODE ANN. § 1305.11 (Page 1962) (U.C.C. § 5-112), OHIO REV. CODE ANN. § 1306.04 (Page 1962) (U.C.C. § 6-105), OHIO REV. CODE ANN. § 1306.06 (Page 1962) (U.C.C. § 6-108), OHIO REV. CODE ANN. § 1307.01 (Page 1962) (U.C.C. § 7-102), OHIO REV. CODE ANN. § 1307.11 (Page 1962) (U.C.C. § 7-206), OHIO REV. CODE ANN. § 1307.15 (Page 1962) (U.C.C. § 7-210), OHIO REV. CODE ANN. § 1307.27 (Page 1962) (U.C.C. § 7-403), OHIO REV. CODE ANN. § 1308.01 (Page 1962) (U.C.C. § 8-102), OHIO REV. CODE ANN. § 1309.01 (Page 1962) (U.C.C. § 9-105), OHIO REV. CODE ANN. § 1309.23 (Page 1962) (U.C.C. § 9-304), OHIO REV. CODE ANN. § 1309.33 (Page 1962) (U.C.C. § 9-314), OHIO REV. CODE ANN. § 1309.34 (Page 1962) (U.C.C. § 9-315), OHIO REV. CODE ANN. § 1309.38 (Page 1962) (U.C.C. § 9-401. Not included in the above count is the disposition of two sections in Article 10. U.C.C. § 10-101 and § 10-102 appeared in Senate Bill No. 5, 104th General Assembly (1961). The first sentence of § 10-101 appeared in Section 3, the second being omitted. Section 10-102 appeared in Sections 2 and 3 and is slightly reworded. These sections do not appear in the Ohio Uniform Commercial Code; on the Ohio changes see Auerbach and Goldston, *Variations in the Ohio Enactment of the Uniform Commercial Code*, 14 W. RES. L. REV. 22 (1962).

[5] OHIO REV. CODE ANN. § 1302.53 (A)(2) (Page 1962) (U.C.C. § 2-509 (1)(b) read "if it does not require him to deliver them. . ." instead of "if it does require him to deliver them. . . ."

of the typographical errors were corrected by the legislature in 1963.[6] However, in that same session of the legislature, there were further changes in eight sections;[7] and two new sections[8] were added. So with the sixty-five differences now between Ohio's law and the 1958 Text and twenty-seven differences between the 1958 and 1962 Texts, after allowing for overlaps,[9] Ohio has eighty-two sections which differ from the 1962 Official Text.

How serious is this? Recently Mr. William Schnader, Chairman of the Permanent Editorial Board for the Uniform Commercial Code, criticized the lack of uniformity in enactment of the Code.[10] He included everything from typographical errors to changes in substance. And he pointed out that Pennsylvania has made no unofficial amendments in ten years.[11]

When the Ohio legislature made the ten substantive changes (as distinguished from the correction of previous errors) in 1963, three were in effect three of the twenty-six changes which the 1962 Official Text made in the 1958 Official Text.[12] But even here Ohio made variations on its own.[13] Changes such as these should be a cause for concern to those who have worked and are working for the Code. Coming when they do, they indicate that enactment does not lessen the work of the

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[6] The legislature did not change OHIO REV. CODE ANN. § 1307.01 (Page 1962) (U.C.C. § 7-102) which ends with "him" instead of "hire" and OHIO REV. CODE ANN. § 1309.34 (Page 1962) (U.C.C. § 9-315) in which subsection "(A)" is followed with "(D)" instead of "(B)".

[7] OHIO REV. CODE ANN. § 1308.01 (Page 1962) (U.C.C. § 8-102), OHIO REV. CODE ANN. § 1308.24 (Page 1962) (U.C.C. § 8-313), OHIO REV. CODE ANN. § 1309.21 (Page 1962) (U.C.C. § 9-302), OHIO REV. CODE ANN. § 1309.22 (Page 1962) (U.C.C. § 9-303), OHIO REV. CODE ANN. § 1309.32 (Page 1962) (U.C.C. § 9-313), OHIO REV. CODE ANN. § 1309.39 (Page 1962) (U.C.C. § 9-402), OHIO REV. CODE ANN. § 1309.40 (Page 1962) (U.C.C. § 9-403), OHIO REV. CODE ANN. § 1309.41 (Page 1962) (U.C.C. § 9-404).

[8] OHIO REV. CODE ANN. §§ 1301.15, 1308.37 (Page 1962).

[9] The following sections appear more than once in the above footnotes so as to affect the count: §§ 1-201, 8-102, 8-308, 8-313, 9-302, 9-403, and 10-104.

[10] Schnader 2.

[11] *Id.* at 249.

[12] OHIO REV. CODE ANN. § 1308.01 (Page 1962) (U.C.C. § 8-102), OHIO REV. CODE ANN. § 1308.24 (Page 1962) (U.C.C. § 8-313), and OHIO REV. CODE ANN. § 1308.37 (Page 1962) (U.C.C. § 8-320).

[13] In OHIO REV. CODE ANN. § 1308.01 (Page 1962), Ohio did not remove (B) (in the U.C.C. it is (2)) defining "Proper form." The U.C. C. did. In OHIO REV. CODE ANN. § 1308.24 (Page 1962), Ohio did not remove (B) (in the U.C.C. it is (2)) saying that the purchaser is not the holder of securities held for him by his broker except under certain circumstances. Nor did Ohio add to this section the subsections (2) and (3) of the U.C.C. The U.C.C. made these changes. OHIO REV. CODE ANN. § 1308.37 (Page 1962) has made a few minor changes and typographical errors. It left the "and's" off the end of subparagraphs (1) and (2) of subsection (A) [(a) and (b) of (1) in the U.C.C.]. In subsection (3) "making

proponents by much. But this writer does not believe that the lack of uniformity caused by their passage is an argument against adoption of the Code.

As to the minor changes in the Code this writer feels that one of Mr. Schnader's criticisms is too strong. Referring to the omission from the laws of Ohio (and Oregon) of section 3-101,[14] he says, "Nothing can justify the result, namely, that sixteen pre-1963 Code states include in their Codes this section as drafted by the Code's experts but that two states made these unnecessary and insignificant changes."[15] This section is a short title. It provides a short method of citing a whole Article of the Code. Several years ago it was decided in Ohio to delete *all* short titles from the statutes.[16] They do not appear in any articles of the Ohio Uniform Commercial Code, because it has been decided that they are not to appear anywhere in the Ohio Revised Code. Uniformity within the Ohio Revised Code was deemed more important than uniformity with other states, especially where it did not involve a change in substance. Most of Mr. Schnader's criticism, however, was deserved as to the minor changes. He makes a good argument in writing, "The amendments which were trivial may be said to have done no harm but it can be said with equal force that being trivial, they should not have been made."[17] But as in the case of the short title, they may be trivial omissions from the Uniform Commercial Code, yet a disturbing addition to a state code.

This writer, while wishing Mr. Schnader success in striving for uniformity, finds himself becoming more and more skeptical about uniformity's being achieved, especially where adoption of the Code makes a major change in prior law. This brings up one provision that represented (before the Code was introduced) the law in a minority of states. Perhaps one should be surprised that more states did not reject it.

III. Bank Deposits and Collections

When the Code was first introduced, one writer, in objecting to it, had some particularly strong words for Article 4, Bank Deposits and

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of appropriate entries on the books of the clearing corporation reducing the *amount* of the transferor or pledgor . . ." should read (according to the U.C.C.) "making of appropriate entries on the books of the clearing corporation reducing the *account* of the transferor or pledgor." (Emphasis supplied.) And finally in (C) what were the first sentences of (3) in the U.C.C. are joined together by "and" into one sentence.

[14] Section 3-101. Short Title. This Article shall be known and may be cited as Uniform Commercial Code—Commercial Paper.

[15] Schnader 242.

[16] Samad, *Foreword and Discussion of Article 1, General Provisions*, 23 Ohio St. L.J. 173, 178 (1962).

[17] Schnader 248.

Collections.[18] Another writer,[19] who defended the Code against the attack, did not like Article 4 either.[20] The writer of this article does not like Article 4. And he hopes that after a few more states have adopted the Code, more critics will be heard from, and that some modifications will be made. But now, nevertheless, he advocates passage of the whole Code.

There is, however, one particular provision which leaves a gap that needs filling. It is the provision of section 4-406(4) dealing with the time limit for a depositor to report the forgery of an indorsement on a check he has written. The subsection reads:

> (4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

The effects of this provision are controversial.[21] The arguments on one side seem to be summed up as: This is too rough on the depositor. On the other side they seem to amount to: No depositor has been unfairly hurt by any similar provision yet. This writer hopes that the legislators (as depositors themselves) will with enlightened self-interest look after the depositors at all times. It is a virtual certainty that there will be no lawyers representing an American Depositors Association or a Mississippi Depositors Association discussing the effects of passage of the Code, or advocating any legislation to protect the depositors from any results of it.

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[18] Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted,* 61 YALE L.J. 334 (1952).

[19] Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel,* 61 YALE L.J. 364 (1952).

[20] Gilmore, *supra* note 19, at 374. The author defended the Code but did ". . . not care to urge enactment of the present text of the Article." He was, however, referring to the earlier version of the Code. And it should be pointed out that he made the following comment on page 374, in footnote 22, "Specifically, I disagree with what Beutel has to say about the following Sections: . . . 4-406; . . ." The citations to the articles by these two gentlemen are not meant to reflect their present attitudes.

[21] For an argument against a similar California law, see Corker, *Risk of Loss from Forged Indorsements,* 4 STAN. L. REV. 24 (1951). On the problem of allocation of losses from forgeries, see Comment, 62 YALE L.J. 417 (1953). The author of the Comment also takes the side of the depositor where he says, "if there should be a policy 'in favor of the mechanical termination of the liability of the bank,' it equally applies to the termination of liability of all parties to the check. The only

By now some of the readers probably think that this is an attack on the bankers; it is not. A discussion of a possible remedy will show that protection for the depositor does not have to be at the bank's expense. A hypothetical case will probably best illustrate the situation here. Suppose Dan Drawer makes a check payable to Pat Payee. It is drawn on The First Bank, where Dan has an account, but where Pat does not. The check is to pay Pat for a debt which Dan owes him. Now suppose that the check is stolen, Pat's name is forged on the back, and the check is cashed. It is highly unlikely that Dan will know Pat's signature well enough to discover the forgery and so he will have to be told about it. The details of the factual situation will have a bearing on the effect of section 4-406(4) on Dan.

Assume the debt arose one of three ways. Dan may owe the money because he borrowed it from Pat and signed a note. He may owe it for goods bought in Pat's store. Or he may owe it because he damaged some of Pat's property through negligence. If he were in Mississippi,

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justifiable treatment of this problem would be a shortened statute of limitations on all actions arising from the forgery whether the actions are based on the instrument or on the underlying transactions." Comment, *supra* at 470. In the New York study of Article IV, one prominent attorney wrote against putting the depositor as the section does; BROME, *Section by Section Comment on Article 4*, 1 REPORT OF THE LAW REVISION COMMISSION FOR 1954 AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE, STATE OF NEW YORK, 307, 320 (1954). Mr. Walter D. Malcolm, a prominent Boston attorney and a member of the Permanent Editorial Board for the Uniform Commercial Code, American Law Institute, wrote Mr. Brome a letter saying that in 25 years of practice he knew of no special hardship worked on drawers because of such a rule, Letter of February 17, 1954, BROME, *op. cit. supra* at 342. Mr. Brome, in a letter to Mr. Malcolm, still maintained that the rule was unfair to the depositor, Letter of June 4, 1954, BROME, *op. cit. supra* at 362. Another expression of opinion similar to Mr. Malcolm's is found in Clarke, *Bank Deposits and Collections: Article IV. Letters of Credit: Article V*, 16 ARK. L. REV. 45, 60 (1961-1962). Mr. Clarke, an attorney with the Federal Reserve Bank of New York and also a member of the Permanent Editorial Board for the Uniform Commercial Code, said that it was believed that dunning creditors would show up before the three years had elapsed. He mentioned the two-year limitation period which then existed in New York and said that he knew of no obvious injustice to a drawer. But he indicated that cases have arisen, where the drawer learned of the forgery too late, which resulted in customer-relations problems. The draftsmen for the Code express a similar attitude. Point 5 of the comments to § 4-406 reads in part, "the three year absolute time limit on the discovery of forged indorsements should be ample, because in the great preponderance of cases the customer will learn of the forged indorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have." (This is the source of the "mechanical termination" quote used in the Comment, 62 YALE L.J. 417, 470 (1953) mentioned above in this footnote.)

Pat would have six years[22] to sue Dan on the note, three years[23] to sue on the open account, and six years[24] for the negligence.

The forger might be an employee of Dan's who stole the check from the outgoing mail. He might be an employee of Pat's who stole the check from the incoming mail. Or he might be somebody having no connection with either Dan or Pat. One might not feel as much sympathy for Dan in the first case as in the last two.

The forger would probably choose one of three possible victims. He might take the check to the First Bank and cash it there. This bank is called the "payor" by the Code. "Drawee" is its older name. Or he might take it to another bank (call it The Other Bank) which would then send it to the First Bank. The Other Bank is called a "collecting" bank. Or he might take it to a store (call it The Store) and be paid the money. The Store might send it to The First Bank or to The Other Bank (which would then send it to The First Bank). Where the check was taken by the forger could determine the ultimate loser.

And finally, many things can happen when the forgery is discovered. Pat might try to get Dan either to give him back the check or to pay the debt. Or Pat might ask The First Bank to pay him the amount of the check. Or he might ask The Other Bank (if someone there took the check from the forger), or The Store (if someone there took the check from the forger) to pay. And if when Pat told Dan what had happened Dan paid him, Dan might try to be reimbursed by The First Bank, The Other Bank, or The Store. If The First Bank paid Pat or Dan, it might try to be reimbursed by The Other Bank or The Store depending on which sent the check. And finally, of course, if The Store took the check and sent it to The Other Bank to be collected, and The Other Bank had to pay someone, The Other Bank might ask The Store for reimbursement. One thing to be discussed below is the probability of success when each tries to collect from the other.

If the forger can be found, and is solvent, he can of course be made to pay. But perhaps he cannot be found. Or he may not have any money. Of the honest people, who must suffer the loss? Since the check was made for a debt owed Pat, his rights ought to be examined first. They will also be examined at the end. Unless Pat accepted the check

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[22] Miss. Code Ann. § 722 (1956). Ohio Rev. Code Ann. § 2305.06 (Supp. 1963) allows fifteen years, except as provided in Ohio Rev. Code Ann. § 1302.98 (Page 1962) (U.C.C. § 2-725) (having to do with sales).

[23] Miss. Code Ann. § 729 (1956). In Ohio the creditor has six years, Ohio Rev. Code Ann. § 2305.07 (Supp. 1963).

[24] Miss. Code Ann. § 722 (1956). So this would be the same as in the case of the note. In Ohio, however, the time limit is only two years, Ohio Rev. Code Ann. § 2305.10 (1953), quite a difference from the fifteen years on the note.

as final payment, he has not been paid his debt.[25]

Begin with a simple set of facts. Suppose that Pat discovers the forgery a month later. Regardless of whether the check was written for the note, the account, or to pay for the loss from negligence, the statute of limitations will be no bar to the suit. Assume that the cancelled check has been returned to Dan with his bank statement. Pat can make one of two claims against Dan. First, he can bring an action against Dan to get the check back.[26] Or if he chooses, he can bring an action against Dan on the debt for which the check was given.[27] If he chooses to get back the check, he can take it to The First Bank and have it paid, or if it is dishonored by The First Bank, he can send notice of dishonor to Dan and sue him on the check.[28] Pat can get the check back because it is his. He does not lose his ownership of the check simply because

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[25]Since a personal check is involved here, the creditor would probably have to agree specifically that the check would be final payment for a court to so hold. See U.C.C. § 3-802: Effect of Instrument on Obligation for Which It Is Given.

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) The obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation. . . .

[26]Britton, Bills and Notes § 145 (2d ed. 1961) [hereinafter cited as Britton].

[27]This is indicated in Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935) though the point was not in issue. It also would follow from the material in note 25, *supra*. It might be suggested that the solution to the drawer's problem would be to use certified checks and thus be discharged under § 3-802 (1)(a). But aside from the expense of doing business this way, the drawer would not solve his problem. Under § 3-411(1) for the drawer to be discharged by the certification (*i.e.*, for there to be "no recourse" as § 3-802 puts it), the holder (in the hypothetical this would be the payee) must procure the certification. It is difficult to imagine a case where the payee would receive the check, have it certified, have it stolen from him and the indorsement forged, and the payee not miss it for three years. Furthermore if the drawer wishes to protect himself by being sure that the payee procures certification, such action on his part would be more involved than simply following through on the check by personal contact with the payee to see if it was in fact properly indorsed.

[28]Miss. Code Ann. § 102 (1956) (N.I.L. § 61) provides: "The drawer by drawing the instrument . . . engages that on due presentment the instrument will be . . . paid . . . according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder. . . ." U.C.C. § 3-413(2) provides, "the drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. . . ." See also Britton 418.

somebody takes it, wrongfully forges his name to it, and cashes it.[29] In fact, under the Uniform Commercial Code, the name signed is regarded as the forger's so as to make him liable to good faith payors and good faith purchasers.[30]

If he has to pay Pat, Dan has a right of action against The First Bank.[31] This is because the bank must pay only people designated by Dan as payees, or others with a right to be paid. A forger is not such a person. If The First Bank was sent the check by The Other Bank, The First Bank has a right of action against The Other Bank for the loss in having to pay Dan.[32] It would have the same right against The Store if the store sent it the check. If The Store had sent the check to The Other Bank, and if The Other Bank had to pay The First Bank, The Other Bank would have a right of action against The Store; but the basis would be different from the basis of The First Bank's right.[33] Whichever took the check from the forger (The First Bank, The Other Bank, or The Store) would eventually be the loser, if it could not collect from the forger. This process of "going back up the line" will be eliminated of course, if Pat goes to the "end of the line" in the first place and collects his money. Whether Pat has the right to go against any of the other three instead of against Dan will be discussed further on.

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[29]Miss. Code Ann. § 64 (1956) (N.I.L. § 23); U.C.C. § 3-404; Hart v. Moore, 171 Miss. 838, 858, 158 So. 490, 496 (1935) also points out that the forgery is "wholly inoperative."

[30]Section 3-404 provides that ". . . it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value."

[31]See Oxford Prod. Credit Ass'n v. Bank of Oxford, 196 Miss. 50, 16 So. 2d. 384 (1944); Masonic Benefit Ass'n v. First State Bank, 99 Miss. 610, 55 So. 408 (1911). It could be no more than dicta in the last case, however, because the drawer's surety had paid the drawer, and the suit was for the benefit of the surety—who lost the suit. Hart v. Moore, 171 Miss. 838, 858, 158 So. 490, 496 (1935) requires the bank to pay either the payee or the drawer. Britton, 406.

[32]Citizens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943). Under the Negotiable Instruments Law as well as at common law this right was quasi-contractual in nature. See Britton 392-98. A leading case allowing recovery by the drawee is Canal Bank v. Bank of Albany, 15 N.Y. (1 Hill) 287 (1841). Under the Uniform Commercial Code the right arises out of warranty given by one sending the check to The First Bank. Section 4-207(1) provides for this even though the one sending in the check does not indorse it. Similar warranties are given by § 3-417(1) to drawees other than banks.

[33]Under the N.I.L. this action was based on warranties given by either § 65 or § 66 [respectively Miss. Code Ann. § 106 and § 107 (1956)]. Under the U.C.C. the action is based on warranties given because of a sale [U.C.C. § 4-207(2) and § 3-417(2)], whereas the warranties given the drawee are given because of a payment. The drawee performs a contractual duty to its drawer; it does not buy the instrument from the person presenting it. See Kessler, *Forged Indorsements*, 47 Yale L.J. 863, 879-80 (1938) where the author summarizes the claims from the payee bank back to the purchaser from the forger.

Since Dan has a right against The First Bank, his duty to pay Pat does not seem to be a harsh one. Any one of the other three might be at the end of the line, however. That is, that one may find that it can collect from no one and so must suffer the loss. One's first reaction perhaps is that the one who took the check from the forger ought to lose. After all, "know your indorser" is a good motto. If anyone has to lose, why not let it be the one who trusts in another's credit and honesty? Why should others pay for the taker's mistake in judgment? Either of the two banks might have some arguments against having to pay if it were the taker.

First, suppose that the bank trusted the forger because he was an employee of Pat. Pat had trusted him, and that might have been good enough for the bank. He might have previously cashed checks (not bearing forgeries) for Pat without any problems arising. Or the forger might have been an employee of Dan and trusted by the bank because of this.

Next consider what happens when a person cashes a check. If it is a small one, the teller takes it, glances at it, stamps it, and hands the customer the money sometimes in less than a minute. If the banks stopped to check thoroughly the signature of its customer on every check that came in, work—in the city banks at least—would bog down in very short order. Anyone who has stood in line in a city bank on a busy day will shudder at the thought. The idea of checking every indorsement for a possible forgery should bring on an even worse shudder. The dishonest employee might be a good forger; and even if he is not, he will probably forge the name in handwriting as different as possible from his own usual signature—if he is smart. The careful teller is going to ask the forger to sign below the forged signature, so the forger will not want the two signatures to be similar enough for him to be caught. A glance by the teller should not catch it. This could be the way for the forger to work through Pat's own bank.

But it was put as a supposition originally that Pat did not have an account in Dan's bank, so suppose the forger took it to The First Bank. If the forger is an employee of Dan's, he may be trusted because he is a depositor's employee. If he works for Pat, he may be trusted because Pat is well-known. But since the bank has no reason to have a copy of Pat's signature on file, how could the teller practically determine whether or not the name on the check had been written by Pat? This assumes that speedy banking service is desired as part of any "practical" method of checking signatures.

The public wants its transactions at the bank handled speedily. Trusting a customer's employee because the customer does (assuming that the bank has not learned elsewhere that the employee is untrustworthy) and a speedy check-cashing service based on trust are steps

toward this end. But since the bank faces an absolute liability to repay money paid on a forged check, and has no one to go against when it takes the check, what can it do? It can insure, and apparently most banks do.[34] The bank then passes the cost of the premiums on to its customers as best it can as part of the service charges. This is part of the cost of the speedy service the public wants. The Store can insure also.[35] Furthermore, to protect itself, The Store can make special arrangements for taking checks and by sending check users to a special department, it can examine checks for forgery more carefully and more slowly than the banks.[36]

If the banks can pass the loss on to its customers, why would men looking after the affairs of banks concern themselves with forged endorsements? Several reasons suggest themselves, whether they are actually subscribed to or not. For one reason, it no doubt goes against some people's principles to pay for losses caused by another person's dishonest employees. For another, one bank may have more forgeries than its competitors and thus may have to pay a higher premium for its forgery insurance.[37] If it is to keep its service charges competitive, this will hurt its profits. For a third reason, the men looking toward possible forgeries may fear that their bank will be in the position of one bank whose customer delayed so long in reporting the forgery that the loss was no longer covered by insurance.[38]

[34]Farnsworth, *Insurance Against Check Forgery*, 60 COLUM. L. REV. 284, 290 (1960). This article discusses the rules involved in forged indorsements as well as insurance available to protect against the losses.

[35]*Id.* at 291-94. On page 294, however, one finds that very few of the businesses insure against forgeries by customers.

[36]Comment, 62 YALE L.J. 417, 443 n.112 (1953) discusses the fact that storekeepers anxious to make sales will take a check when necessary to make a sale. The author points out, however, that it might be difficult for the small storekeeper to cover his losses from forgeries because he must keep his prices competitive. But the other side is that putting the loss on the drawee bank or collecting bank who takes from a forger is good because it forces the banks not to cash the checks of strangers. Kessler, *supra* note 33, at 888. It would be equally good business practice for The Store in the hypothetical to be careful in handling of checks.

[37]The article on insurance indicates that experience (including that under forgery coverage) is considered in computing the premium. Farnsworth, *supra* note 34, at 291. This is apparently not like a group policy where each member of the group is charged the same premium, even though some members would be better risks than others. This is also mentioned in Comment, 62 YALE L.J. 417, 435 n. 86 (1953) in a letter there quoted. Too many forgeries, by causing an increase in premiums, thus add to the bank's expenses.

[38]C. E. Erickson Co. v. Iowa Nat'l Bank, 211 Iowa 495, 230 N.W. 342 (1930). This case is mentioned in Kessler, *supra* note 33, at 897 (where the author suggests that large businesses which are victims of their own employees' forgeries should bear the risk of those losses). The problem of being barred from claiming against an insurance company will not, of course, arise where the bank is a self-insurer.

Banks do assume the risk for a period of time—usually three years, except in Georgia.[39] This writer feels that the bank should cover the risk for as long as the payee can recover from the depositor, when the depositor is an individual who cannot insure against the loss.[40] A law which would so protect the drawer would put its stamp of approval on the use of checks to pay debts. This writer believes that this method of payment should be approved and encouraged.[41]

Since the Code provides for a short term risk, the writer takes what he considers a pragmatic approach. He assumes that section 4-406(4) is here to stay for awhile. The problem, then, is to protect the depositor who cannot insure—who does not even know of the need to do so—with section 4-406(4) still in effect.

Notice how section 4-406(4) affects the situation. It gives Dan three years to "discover" a forged indorsement, or he cannot bring an action against The First Bank for the wrongful payment. The writer's interpretation of the section causes him to believe that it is not a statute of limitations. It is worse for the depositor. A statute of limitations can be suspended.[42] This bar of section 4-406(4) is absolute after three years.[43] And though Dan cannot sue The First Bank, Pat can still sue him. There is no section in the Code to bar Pat from suing Dan after the three years; and, as pointed out above,[44] some causes of action have a six year limitation (which, if the running of the statute be suspended, can actually be much much longer). So if Dan sends Pat a check to which Pat's indorsement is forged, and word of the forgery gets to Dan after three years, Dan is caught in the middle. He must pay Pat, and he is out the money the bank has charged against his account.

At this point, there is perhaps an objection which should be anticipated and met. Is it not a little absurd, the reader may ask, to assume

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[39]GA. CODE ANN. § 109A-4-406 (Supp. 1963).

[40]For the individual to insure is impractical. Farnsworth, *supra* note 34, at 308. It is more difficult for him to insure than for the bank. Kessler, *supra* note 33, at 896. And the total administrative costs of insuring increase if the individuals rather than the banks are made to insure. Comment, 62 YALE L.J. 417, 436 (1953). A possible method of insuring the depositors would be by (or through) the banks themselves, or under a program similar to that of the Federal Deposit Insurance Corporation.

[41]This writer does not think that harsh rules against depositors will cause a sudden drop in the use of checks as a method of payment. Most people do not know the rules exist. There is some indication, however, that the laws governing checks in Europe may affect their use. See the text accompanying note 79 *infra.* If this is so, it is an indication that the public becomes informed eventually.

[42]MISS. CODE ANN. § 740 (1956). It may also be extended in cases of disabilities. MISS. CODE ANN. § 738 (1956).

[43]A similar statute was so interpreted in Housing Authority v. Commonwealth Trust Co., 25 N.J. 330, 136 A.2d 401 (1957).

[44]See notes 22 and 24 *supra.*

that Pat will wait for more than three years to find out why Dan has not paid his debt? Surely he would have gone to Dan before this and asked for the money. At that point the forgery would have been discovered. Comment 5 of section 4-406(4) uses this argument.[45] But that depends on the fact situation. For instance, it might not be so easy to discover the forgery if Pat owned a large establishment where the forger was a trusted employee who covered his tracks for several years by concealing the fact that the debts were not paid. These debts need not be open account debts, where the three year statute of limitations coincides with the three year cut-off period of the code. The possibility of passing the loss on to Pat in such a situation will be discussed later. However, to the extent that the objection has merit, this writer believes that an argument similar to Mr. Schnader's[46] is an answer. If this sort of thing never happens, let the banks assume the risk. Leave it on the depositor only when he knows of the forged indorsement but does nothing to save the bank. In any event, those drafting the Code put the risk on the depositor after three years. And in two states the section has been further altered, in favor of the banks. In Georgia the time limit for Dan to notify The First Bank has been cut down to one year.[47] This would have been a good target for Mr. Schnader's article. There was formerly a one-year statute of limitations in Georgia for suits on indorsements.[48] In Ohio there was a statute[49] similar to section 4-406(4), but it had a two year limit. Ohio adopted the Code, extending the time limit to three years.[50] The Georgia Code, as adopted, reflected a continued disregard for the depositor's interest on this point, departing from uniformity as it did so. In Ohio another subsection was added to section 4-406: "(F) An action against a bank arising out of an unauthorized signature or indorsement of the item must be brought within one year after the customer has notified the bank of his claim as required by the provisions of this section."[51]

Before the Code was introduced, statutes cutting off the depositor's

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[45]See note 21 *supra.*

[46]See the text accompanying note 17 *supra.*

[47]GA. CODE ANN. § 109A-4-406 (Rev. 1962) allowed one year to report a forgery of the drawer's signature or a forged indorsement. This was because the Uniform Commercial Code was adopted in Georgia. The present law cuts back the time to discover and report forgeries to 60 days. The time for reporting forged indorsements was left at one year, however. GA. CODE ANN. § 109A-4-406 (Supp. 1963).

[48]GA. CODE ANN. § 13-2052 (Supp. 1961).

[49]OHIO REV. CODE ANN. § 1307.09 was the applicable section; it was repealed by this Uniform Commercial Code.

[50]OHIO REV. CODE ANN. § 1304.29(D) (Page 1962).

[51]OHIO REV. CODE ANN. § 1304.29(F) (Page 1962).

rights so soon were in force in only a few states.[52] For the sake of "uniformity" the majority has been asked to adopt the view of the minority. This would not be objectionable if there were more merit in the change than in leaving things as they were. There is merit in telling a depositor to check his vouchers for forgeries of his own name. But telling him to take steps to "discover" forgeries of other people's names is more impractical than telling banks to examine small checks for forgeries.

Are there possible ways of escape for the depositor? This section would not matter if (1) Pat chose to sue someone other than the depositor, Dan, or (2) Dan could still sue someone other than The First Bank, or (3) Pat could not sue Dan. These possibilities, then, should be examined.

Suppose that Pat decided not to sue Dan, or could be persuaded not to sue him, or decided to sue both him and one of the others. Which could he sue? Under the Code he could sue either The First Bank or The Other Bank in conversion. He can sue The First Bank[53] whether it was the taker from the forger or not. As of 1963, the law in Mississippi as to Pat's right to sue The First Bank was uncertain. One case[54] said that he could not, but two later ones allowed such a suit.[55] The Other Bank could be sued in conversion under the Code;[56] but under certain circumstances Pat would probably not collect anything.[57] In Mississippi

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[52]After Pennsylvania had adopted the Code in 1953, ten other states had such laws, with varying time limits. California—one year; Connecticut—one year; Georgia—one year; Massachusetts—one year; New Jersey—two years; New York—two years; Ohio—two years; Virginia—two years; Wisconsin—two years; and Wyoming—30 days. All but Virginia have subsequently adopted the Uniform Commercial Code. Montana might have been in the class. Its statute referred to payments based upon "a forged, raised, or otherwise altered check" [MONT. REV. CODE ANN. § 93-2618 (1963)]. This writer could not find that this had ever been interpreted to include forged indorsements. Montana has since adopted the Code also. Louisiana had (and still has) a statute setting a one-year limitation on claims based on checks payable to fictitious payees. LA. REV. STAT. ANN. § 6:53 (1950). For the relationship of this to the forged indorsement problem, see the text material with note 83 *infra.*

[53]U.C.C. § 3-419(1)(c).

[54]Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570 (1930).

[55]Commercial Nat'l Bank & Trust Co. v. Hughes, 243 Miss. 252, 137 So. 2d 800 (1962); Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935).

[56]U.C.C. § 3-419(3).

[57]*Ibid.* ". . . a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands." It is not likely that the forger will leave the money in the collecting bank any longer than necessary. And if the payee sues after three years (rather than tries to collect from the depositor who will have lost his rights against the drawee), surely there will be nothing left.

a case[58] held that one who had taken the check from the forger and paid him was liable to the true owner (here Pat). The action was not for conversion, but the case does answer the question. That is, Pat can sue. So if he wishes, Pat can cut off the need for the intermediate suits ("going up the line") by suing the ultimate loser directly. But can it be argued that depending on the payee to sue someone other than the depositor is the proper way to look after the depositor's interest? Depending on such a possibility may not help Dan, for instance, if his debt is based on an action with a longer statute of limitations than conversion. The time may be past for Pat to bring conversion against the payor, but not past for him to bring an action on the underlying debt against Dan.

What then of the second possibility, Dan's suing another party? There has been conflict as to whether Dan can bring such an action,[59] and no Mississippi case ruling on it was found. A very recent Massachusetts case, *Stone & Webster Engineering Corporation v. First National Bank & Trust Company*,[60] has ruled against the drawer's recovery. It was decided after Massachusetts had adopted the Uniform Commercial Code, and the court attempted to solve the problem by interpreting the Code. Two counts were brought in contract, another in tort for conversion of the checks, and the fourth in tort for negligence in "cashing" the checks with the forged indorsements. The payee lost the first two counts, both for money had and received, because the court said that the defendant had no money in its hands which belonged to the plaintiff.

As to the count for conversion the court said that since section 3-419(3) (mentioned above)[61] does not say to whom the collecting bank is liable, the case had to be decided on prior law. The court cited numerous cases in other jurisdictions going both ways, then with no prior Massachusetts cases as precedents, it worked out its own solution. And it worked out the solution through reference to the Code.

It pointed out defenses allowed by several sections,[62] among them section 4-406(4). Some of these defenses are allowed to the payor bank (in this paper called The First Bank) when sued by the depositor. The court said that if the drawer were allowed to sue the collecting bank,

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[58]Thomas v. First Nat'l Bank, 101 Miss. 500, 58 So. 478 (1911). The taker was a collecting bank. See also Annot., 67 A.L.R. 1535 (1930); 31 A.L.R. 1068 (1924).

[59]See BRITTON 417; Gustin-Bacon Mfg. Co. v. First Nat'l Bank, 306 Ill. 179, 137 N.E. 793 (1923); Railroad Bldg. Loan & Savings Ass'n v. Bankers Mortgage Co., 142 Kan. 564, 51 P.2d 61 (1935); Lavanier v. Cosmopolitan Bank & Trust Co., 36 Ohio App. 285, 173 N.E. 216 (1929); Annot., 102 A.L.R. 145 (1936). This paper seeks the answer to recovery against anyone who received it from the forger, not just banks.

[60]184 N.E.2d 358 (Mass. 1962), 4 B.C. IND. & COM. L.R. 449 (1963), 43 B.U.L.R. 144 (1963).

[61]U.C.C. § 3-419(3).

[62]It mentioned U.C.C. §§ 3-406, 4-203, and 4-406.

the assertion of the defenses would be difficult. Also one of the defenses[63] was one which the collecting bank (here The Other Bank) would have against the payor bank, but which could not be asserted against the drawer. The negligence count failed because the court said that the plaintiff had not proved that it had been damaged by the defendant's "cashing" the check.

This case is open to criticism on several points. It admits[64] that the collecting bank may be liable in conversion to somebody, then concludes that that person is not the drawer. To let the drawer sue would circumvent the defenses. Who then could sue in conversion? The court admits that if the checks had been delivered to the payee, the payee could have sued in conversion.[65] But to let the payee sue in conversion would equally circumvent the defenses. And to let the payee sue the payor bank, as the Code does,[66] would circumvent any defenses the payor has against the drawer.

The court also said that the collecting bank had "no money in its hands which belongs to the plaintiff."[67] It further said,[68] "The amounts the defendant received from First National to cover the checks 'cashed' were the payor bank's funds and not the plaintiff's." To paraphrase an argument[69] against a similar statement in a California case[70] several years ago, would the court have said the same thing and denied the drawer the right to recover, if the drawer were suing the actual forger instead of the collecting bank? Would they have done so if the drawer had sued the forger after the three year limit for suing the payor had passed?

This writer has no quarrel with the result, however, so long as the holding is limited to the facts involved. This was the case of a dishonest employee of the drawer, and the drawer was apparently a company able to insure against such a loss.

How important is the case? Recently there was published an article[71] calling for uniform construction of the uniform laws. The argu-

[63]According to U.C.C. § 4-406(5), if the payor bank does not assert its defense when a customer presents a claim *(e.g.,* because of payment of an instrument bearing a forged indorsement, after three years), the payor cannot assert a claim against a collecting bank. See text material at note 75 *infra.*

[64]Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co., 184 N.E.2d 358, 361 (Mass. 1962).

[65]*Id.* at 362.

[66]U.C.C. § 3-419 (1)(c).

[67]*Supra* note 64, at 360.

[68]*Id.* at 361.

[69]Corker, *Risk of Loss from Forged Instruments,* 4 STAN. L. REV. 24, 43 (1951).

[70]California Mill Supply Corp. v. Bank of America Nat'l Trust & Savings Ass'n, 36 Cal. 2d 334, 223 P.2d 849 (1950).

[71]Merrill, *Uniformly Correct Construction of Uniform Laws,* 49 A.B.A.J. 545 (1963).

ment put forth has much merit, and much uniform construction can be expected. It is possible that the Massachusetts case will be followed. In a handbook[72] on Article 4, the authors discussed the possibility of the drawer's being cut off from suing the payor bank. They suggested that the drawer might be able to sue the collecting bank under prior law. What effect will the *Stone & Webster* case have on this possibility? This writer concedes that the case cannot be said to hold that the Code supersedes prior law. That is, it cannot be said to hold that the Code when properly interpreted requires a reversal of prior rulings that the drawer can sue the collecting bank. This is so since Massachusetts had no prior law to change. But there is here the suggestive power of a "post-Code" case, plus an argument that it interpreted the Code, plus the plea for uniformity of interpretation. This combination could cause this ruling to be adopted in states which have not subscribed to it before.

It would seem, then, that the possibility of Dan's playing legal leapfrog and recovering from The Other Bank might not be too good, especially if the court is interested in preserving the defenses The Other Bank might have against The First Bank or that The First Bank has against Dan. Would the court have held the same way if the taker from the forger had been The Store rather than a bank? One writer has indicated that Dan should be able to recover.[73] But would this not circumvent defenses? Would the money not "be the payor's" rather than the drawer's? The possibility of recovery from The Other Bank or The Store does not seem to be one Dan can depend on. And he does not even have a possibility when The First Bank takes from the forger (and three years have passed).

What then of the last possibility, of denying Pat's right to recover from Dan? If Dan's employee has stolen the check and forged it, there does not seem to be much purpose in arguing that Pat ought to suffer the loss. But suppose it was Pat's employee who stole the check as it came in the mail, and forged the payee's name on the back. Can one say that since Pat trusted this dishonest person, employed him, and put him in the position where he was able to forge the check, the loss should fall on him? The Mississippi court has refused to follow this line of argument.[74] Apparently, then, Mississippi will not throw the loss on the payee when his employee forges the indorsement.

And so the discussion comes back to the beginning: which of three innocent parties should suffer the loss, the bank, Dan, or Pat? The bank suffers it until the three years are up. But notice that under section 4-406(4) after three years the bank is free from suit even though it has

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[72]Clarke, Bailey & Young, Bank Deposits and Collections 165-67 (1963).

[73]Bailey, Brady on Bank Checks 517 (1962).

[74]Hart v. Moore, 171 Miss. 838, 158 So. 490 (1935). See also on this, Restatement (Second), Agency § 177 (1958).

been negligent and Dan has not. So the hypothetical could be one where the bank is not so "innocent," and yet where Dan would lose. Suppose that after the three years have passed the payor bank, just to stay on the good side of the depositor, repays the money. Suppose it then tries to bring an action against the collecting bank (The Other Bank) or others (The Store) since they are not mentioned in section 4-406(4). Section 4-406(5)[75] prevents an action against the collecting bank and prior parties in such a case. So section 4-406(4) is for the benefit of these prior parties also.

To determine just what the best solution would be, first compare some of the reasons for allocating the loss to any one of the parties.[76] Some were mentioned earlier.

If the loss is placed upon the person who took from the forger, it is placed on somebody who could have prevented the loss. Since it encourages good business practices to place the loss here, this rule of allocation probably has the most to recommend it.[77] The Europeans prefer to encourage the negotiability of checks, so a person taking from one who forges an indorsement has a good title.[78] But there is possibility that this rule has caused Europeans to use checks less than Americans do.[79] Surely American bankers would not want to discourage the use of checks, even though increased negotiability would be to their advantage.

The loss is placed on the banking system if a bank takes the check from the forger. Thus far this is merely a particular example of the argument in the preceding paragraph. But some[80] believe that it should remain there after the three years have passed, since the system can dis-

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[75]Section 4-406(5) is as follows:

> (5) If under this section a payor bank has a valid defense against a claim of a customer upon or resulting from payment of an item and waives or fails upon request to assert the defense the bank may not assert against any collecting bank or other prior party presenting or transferring the item a claim based upon the unauthorized signature or alteration giving rise to the customer's claim.

[76]Comment, 62 YALE L.J. 417 (1953) presents a thorough treatment of the problem of allocation of loss.

[77]For an argument on each side of this point, see note 36 *supra*.

[78]Kessler, *supra* note 33, at 863-64. The development of this law is elaborated on in pages 864-71.

[79]*Id.* at 895.

[80]For two suggestions of this approach see Corker, *supra* note 69, at 30-31; Kessler, *supra* note 33, at 896-97. But both writers indicate that they would not always put the loss there, especially when the forger is an employee of the drawer. The first states as a postulate that the party with the best opportunity to avoid the loss should bear it. Corker, *supra* note 69, at 30. The second would let the drawer sustain the loss where the forgery is committed by an employee of a large business concern which could have prevented the loss by proper supervision. Kessler, *supra* note 33, at 896-97.

tribute the loss. Indications are that this argument is not gaining much ground at present.[81]

What about the depositor, then? So long as he acts timely, the loss is not on him. What are the arguments for putting the loss on him? First, he may be able to insure if he is a businessman, or bear the risk even better if he is a governmental body. Second, he might not be as innocent as it seems. All of the parties except the forger in this hypothetical are innocent as was said in the beginning. But it might be argued that some are more "innocent" than others.[82] An employer whose failure to check on his employees results in the loss of a great deal of money through successive forgeries is not one this article seeks to protect. It is understandable that those who took from the forger would complain about having to repay the forger's careless boss.

Two schemes involving drawers not completely blameless caused much fancy footwork in legal opinions before the Code. One involved the imposter who defrauded the drawer into writing him a check. The other involved the dishonest employee who invented a fictitious name for a payee and "indorsed" that "person's name" on the back of checks written by the drawer. These two practices are adequately discussed elsewhere and need not be covered again here.[83] It is enough to say that these two "forged indorsement" problems are taken care of by another Code section which places the loss on the drawer.[84]

But there will be other cases of employees who violate the employer's trust in ways that could be caught early by prudent employers. If good business practices mean "know your indorser," they should mean "know your employees" also. One writer has said[85] that although there had been cases in New York where the depositor was barred from suing the bank, he knew of none involving "obvious injustice." If the drawer were the employer of the forger, he should have little trouble finding people who would make the same assessment of the cases.

What has been said above about the drawer can be said about the payee also. For he too may be a good risk spreader, and he may have dishonest employees.

What then can be done for the drawer? It has been suggested that the payee be subject to a shorter statute of limitations so that he cannot

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[81]Farnsworth, *Insurance Against Check Forgery*, 60 COLUM. L. REV. 284, 285 (1960).

[82]Perhaps a better expression is that of another writer, that a party may be "unworthy" of protection. Kessler, *supra* note 33, at 880.

[83]BRITTON 425-47.

[84]U.C.C. § 3-405.

[85]Clarke, *Bank Deposits and Collections: Article IV Letters of Credit: Article V*, 16 ARK. L. REV. 45, 60 (1961-62).

sue the drawer.[86] This writer would object to that to the extent that it prevents an individual payee from suing a drawer better able to bear the risk than he. Another suggestion is to provide that the three years begin when the drawer learns of the forgery.[87] But this would involve amending the Code, and this writer feels that this should be done by the Permanent Editorial Board. This writer wishes to suggest something that the Mississippi Legislature can do now.

For the present the best thing is a statute, but not a statute of limitations. It should absolutely bar claims just as section 4-406(4). It need not be attached to the Uniform Commercial Code. It should provide that if lack of knowledge of the forgery of the indorsement causes the drawer to be precluded from asserting a claim against the drawee because of section 4-406(4), he can discharge his duty by an assignment. He would assign to the person whose indorsement was forged all claims arising out of the forgery which he, the drawer, would have against the drawee, any collecting bank, and any other parties prior to them. In return for this assignment he would be discharged from his duty on both the item and the underlying debt.

The assignment is suggested because it is not certain what rights the courts will determine drawers have under the Code. The *Stone & Webster* case covers only one possibility, and it may not be followed in other states. The payee will then acquire the drawer's rights. He will also have his own rights. These may be better than the drawer's rights; only time will tell.

There should be a further provision to exclude the United States government[88] from the benefits of the assignment. Also excluded should be such other good "risk bearers" (say large corporations able to insure) as the legislature sees fit to add. The proposed statute is meant to protect the private individual drawer and payee (where the drawer is not a private individual). It is also possible that the legislature will want to add a provision excluding the drawer whose employees forged the indorsement.

There may be another provision worth considering. It is possible that Dan's check would get to Pat and that Pat would use it to pay a debt to someone (call him Ira Indorser). Then Ira's name would be forged. Ira would be the true owner. What should be done about Pat's debt? It may be that the best thing is to discharge everybody back to

[86]Comment, 62 YALE L.J. 417, 470 (1953). The same author also suggests that "restrictive drawing" be used. This would mean that the drawer would not make the check payable to the payee, but to the payee's bank account. This is similar to the English practice of crossing checks. Comment, *supra* at 472.

[87]Corker, *supra* note 69, at 49-50.

[88]The United States Government may not be subject to the Code (and § 4-406(4)). *But see* Note, 37 MINN. L. REV. 201, 202 (1953). On the problem of forgery and the government, see Note, 66 YALE L.J. 1107 (1957).

and including the drawer, then beginning with the payor and going back to the taker from the forger (assuming that this was not the payor bank), the true owner could sue the parties in conversion, quasi contract, or whatever the courts hold is left to him under the Code.

IV. "The Man on the Street vs. The Uniform Commercial Code"

A recent article on the Code contained the following: "Every phase of commercial transactions is included in the Code in such language that an average layman will understand the rules governing any transaction."[89] To the same effect, the late Professor Karl Llewellyn observed, "Never in American History has any statute, much less as large a one as the Code been presented to the bench, bar, and public in form so easy and so safe for any man to use. . . ."[90]

But this writer does not agree that this Code is easy for a layman to understand. He knows from experience that it is not easy for law students to understand, even some of the better students. As has been said about other things, this is not something which "he who runs may read."[91] Professor Llewellyn had previously said that problems in commercial transactions were difficult (for students anyway) to understand.[92] And this writer believes that difficulty in understanding the Uniform Commercial Code does not stem from the wording. It stems from its subject matter.

Understanding the facts in a commercial problem can be difficult for those not familiar with the transactions and the language. Trying to teach upperclassmen in law school the special meaning of words such as "accept," the difference between cutting off defenses to instruments and cutting off equities of ownership, the reason why "on demand I

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[89]Witherspoon, *Prognosis of the Uniform Commercial Code,* 34 Miss. L.J. 292 (1963).

[90]1 Report of the Law Revision Commission for 1954 and Record of Hearings on the Uniform Commercial Code, State of New York 17 (1954).

[91]Among the possible sources of this expressing is *Habakkuk 2:2* (King James): "And the Lord answered me, and said, Write the vision, and make *it* plain upon the tables, that he may run that readeth it." It also appear in "Tirocinium" by William Cowper (1785): "Shine by the side of every path we tread with such lustre, he that runs may read." For a legal citation see Allhusen v. Caristo Const. Corp., 303 N.Y. 446, 103 N.E.2d 891, 892 (1952), "The plainest words should have been chosen so that he who runs could read. . . ."

[92]"We have a *transaction* when two or more parties get together to accomplish something. They bargain, they sell, they lease, they write insurance. . . . But what I am calling *events* will rarely be intended by both parties, if by either. A man is killed. . . . There is a brawl. . . . With events, equally, however, visualization helps. But their dramatic character leads commonly of itself to your doing what visualization you may need. Hence the facts of tort cases commonly are 'easy.' But in the facts of contract cases, or of property cases, you are more like to have to drive yourself to the work. Drive, then, for it is needed." Llewellyn, The Bramble Bush 60 (1960 ed.).

promise to pay" does not mean that a demand is necessary to give rise to a liability to pay, and the meaning of *jus tertii* defenses is difficult enough. And these problems would exist for the students under common law rules or the Negotiable Instruments Law as well as the Code. But working with the interpretation of the Code is no easier. The only thing more difficult for them is finding the policy behind it.

Some of the provisions may be clear to anyone. But without some knowledge of commercial transactions, proper interpretation of many of the provisions will be a matter of chance. The comments do not always help. The cross references do not always help. Simple logic does not always help. To understand what those who drafted the Code were striving for, one must sometimes understand what they were faced with, and this is not always easy. Some more sophisticated businessmen may understand the provisions of the Code, but not necessarily others whom it governs—especially the everyday bona fide purchaser or depositor. A few examples should illustrate this.

For an exercise in logic and in use of the cross references, take section 3-201. It begins, "Transfer of an instrument vests in the transferee such rights as the transferor has therein, . . ." So *A* transfers to *B* who transfers to *C* who transfers to *D*. If *B* gets *A*'s rights, then it must logically follow that when *C* gets *B*'s rights among them will be those rights of *A* which *B* received and still has. So also must *D* get *C*'s rights which include the rights *C* received from *B* and still has. Thus *D* gets *A*'s rights, *B*'s rights, and *C*'s rights, if each transferor has them at the time of transfer. *All* of those rights? Probably not. At least this is not what the Code seems to have in mind further on. Section 3-417(2) implies that if a person transfers an instrument without indorsing it, his warranties extend only to his transferee. Does this mean that section 3-417(2) limits the rights passed by section 3-201? Before trying to work out an answer, one should ask, "how would the layman know that the two sections have any relationship to each other?" The cross references at the end of the comments to section 3-201 do not refer the reader to section 3-417. The cross references for section 3-417 do not refer the reader to section 3-201, but they do so for point 4 of the comments. Point 4 is a discussion of section 3-417(1)(b) not section 3-417(2).

We might assume, however, that if a person with a problem on transfer of an instrument were to consult the Code, he might have a copy with an index and that the index would refer him to both these sections. Under section 3-417, the discussion in point 7 of the comments indicates that the warranties go no further than the immediate transferee. The writer believes that the intent of section 3-417(2) is to limit section 3-201. For while section 3-201 was put into the Code to allow a transferor to sell almost all the rights he has because of the instrument, and thus help the instrument's transferability, it probably was not meant

to allow him to sell his rights against his non-indorsing transferor. Otherwise the (attempted) limitation of section 3-417(2) would be meaningless.

There is a possibility that under certain circumstances the problem can be avoided. Under section 3-201(3) if *A* transfers to *B* without indorsing and the instrument is not payable to bearer, *B* has a right to *A*'s indorsement. Section 3-201(1), through the logical process above, could be interpreted to mean that *D* has a right to *A*'s indorsement. Once *A* indorses, under section 3-417(2) his warranties will run to *D*. However, the right to the indorsement is not certain, since the section does not give it expressly; and it will not exist if the instrument is payable to bearer. But if the layman now thinks he understands this, he should be sure to read all the cross references under section 3-417 first. For there is an exception to this exception. If the transferee is a collecting bank, it can sell its non-indorsing transferor's warranties. Under section 4-207(3) the warranties go to subsequent collecting banks, whether the transferor (customer) warrants or not. So section 4-207 qualifies section 3-417(2).

The warranties extended by section 3-417 are similar to those which accompany a sale of goods. That is, the seller of the instrument makes certain warranties about it; and if a warranty is broken the buyer has a claim against the seller. This is not the same as the contract of the indorser which provides that if the instrument is dishonored, he will pay provided he gets the necessary notice. That contract is covered by section 3-414 of the Code. To recover under that contract, the instrument must be presented for payment at the proper place and time and if it is dishonored the proper notice must follow within the specified time.[93] No presentment or notice is required for suit on breach of warranty.[94]

Section 3-417(2)(d) could cause a layman some trouble. What it says in effect is that when a person sells an instrument to another, the seller warrants that nobody has a good defense against him. When one person gives an instrument to another, the donor of course has the defense of no consideration against the donee. And likewise when a person obtains an instrument by fraud (as by selling stock in a non-existent gold mine) the defense of fraud is good against the transferee. Point 9 of the comments to section 3-417 says of (2)(d), "Even where the buyer takes as a holder in due course who will cut off the defense, he still does not undertake to buy a lawsuit with the necessity of proving his

[93]The proper methods of performing these conditions precedent are covered in U.C.C. §§ 3-501—3-511.

[94]Ogden, Negotiable Instruments 234 (5th ed. 1947). This, of course, would follow from the fact that warranties are made by qualified indorsers as well as transferors who do not indorse. In neither of these two cases would it do any good to send notice of dishonor because the parties do not promise to pay after dishonor.

status. . . ." This Code section would let the indorsee sue the indorser who had been guilty of fraud (against his own indorser) even though the crook indorsed without recourse. This would be true even though the indorsee as a holder in due course would not have been subject to the defense of the fraud victim. The loss then would lie where it ought to and only one lawsuit would be necessary.

But suppose the warrantor had been presented with a promissory note by his father, as a birthday gift. And suppose that his transferee took as a holder in due course. When he sold the note to the transferee, was there not a breach of warranty? Did the father not have the defense of failure of consideration? Under this section it would appear that the son would be subject to suit from the time of transfer until the statute of limitations has barred the action. The son could even be sued after the instrument is overdue even though the holder does not try to collect from the father at the time the instrument matures. So the holder could collect from the son (even though he could also have collected from the father). Suppose then that the father has died in the meantime and those handling his estate do not wish the father's gift to be effective. If the holder claims against the estate, the gift is complete because the defense is no good against a holder in due course. But if the holder collects from the son, the estate can refuse to pay the note. Did those drafting the Code mean for the holder to have this power? Can a layman tell?

The comments on the whole are helpful, but some do not help this writer in understanding the sections. Consider under section 3-116, the last paragraph of the comment. The person who wrote this must have had quite a sense of humor. In prior paragraphs he has told the reader that if an instrument is payable to "*A* or *B*" either may indorse. If it is payable to "*A* and *B*" both must indorse. Now follows the last paragraph: "If the instrument is payable to 'A and/or B,' it is payable in the alternative to A, or to B, or to A and B together, and it may be negotiated, enforced, or discharged accordingly. . . ."

Does he mean that it is payable to *A* or *B*? If it is payable to *A* and *B* (if *both must* indorse) it cannot be payable to *A* or *B* (since *only one* would *need* to indorse). If it is payable in the alternative to one of these two possibilities, who gets to pick the alternative? In the case of a check, perhaps the harrassed bank teller? If he pays and it is wrong will his bank be liable for improper payment? If he refuses and that is wrong, will the bank be sued for slander of credit? He would probably pick alternative "*A* or *B*" and settle for one indorsement. But can he be sure that he gets to do the picking? If the comment means that either the name "*A*" or "*B*" is sufficient, but that it does not matter if both appear, the writer could have said, "it is payable in the alternative to *A* or *B*." For surely when the instrument is payable in the alternative, it

cannot matter that both payees indorse.

Perhaps what the comment-writer should have written was, "If the instrument is payable to 'A and/or B,' it is void, the underlying debt is trebled, and the one making it so payable shall be barred from using commercial paper for not less than two nor more than ten years. . . ."

This assumes, of course, he does not like "and/or" any more than this writer does.

V. Conclusion

This writer has tried to anticipate two of the arguments opponents of the adoption of the Uniform Commercial Code might use—that it is in fact not uniform and that it is not easy to understand. But he believes that the Code should be adopted anyway. The lack of uniformity is something that will have to be worked on. The difficulty is no argument against the Code. The Code is meant to be used by lawyers, a group which it is hoped will not be against using their minds. If it is difficult, it is not the only subject that they find difficult. And the field of commercial law will certainly not be less difficult without the Code.

As for the statute which the writer suggests passing, he hopes that the legislature will at least consider it and in one way or another protect the depositor who is now in a vulnerable position. He has tried to show both the side of the bank and that of the depositor as fairly as possible. There are no doubt some who will think that the whole of the third part of this paper is like a crusade to capture the Loch Ness Monster. It may be, but others do not think so. Perhaps the legislators will not think so.

IS THE TAX COURT CONSTITUTIONAL?

*Daniel L. Ginsberg**

I. Introduction

Three courts possess original jurisdiction in federal tax matters: the Court of Claims, the federal district courts and the Tax Court. The latter is distinctly separate from the other two and maintains specialized and separate rules of practice and procedure. Some of the differences between the practice and procedure of the Tax Court and the practice and procedure of the United States district courts are outlined below:

TAX COURT	DISTRICT COURT
(1) Follow district court rules of District of Columbia	(1) Federal Rules of Civil Procedure
(2) No filing of pleas for recoupment possible	(2) Pleas for recoupment possible
(3) No discovery procedure as a matter of right	(3) Discovery procedures available
(4) Tax Courts permit accountants to qualify before it and they may even act in lieu of attorneys	(4) No accountants admitted to practice
(5) Twelve-year tenure of office for judges	(5) Life tenure
(6) No jury trial permitted	(6) Jury trial
(7) May press stipulations on litigants	(7) No stipulations forced
(8) Rules provide for oral argument, but permitted only at discretion of judge.	(8) Oral argument permitted, freely
(9) A tribunal of limited jurisdiction	(9) Possessed of broad "unwritten" or common law powers
(10) No equitable jurisdiction	(10) Combine law and equity

The philosophy behind the creation by Congress of the United States Board of Tax Appeals, today known as the Tax Court of the United States, is perhaps best illustrated in this passage, written in 1924, which appeared in the House Ways and Means Committee Report.

> The payment of a large additional tax on income received several years previous and which may have, since its receipt,

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> been either wiped out by subsequent losses, invested in non-liquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after his payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.[1]

It follows then, the Tax Court was created to meet a special need—that of the taxpayer unable to cover the deficiency determination of the Commissioner of Internal Revenue and later forced to sue for its recovery, after payment in the federal district court or the Court of Claims. Now he could seek a determination of his tax liability without prior payment to the Commissioner.

In 1942, eighteen years after its creation, Congress took an historic step and legislated that the "members" of the court shall henceforth be known as "judges."[2] However, this court is not composed of judges who hold office during good behavior and receive undiminishable salaries, as is the case with the Court of Claims and all other federal courts. Considerable controversy has been generated as to just what the exact nature of the Tax Court is. Is is a court?[3] Is it an agency?[4] Is it subject to the Administrative Procedure Act?[5] No clear-cut answers evolve. Even today, the actual status of this tribunal has never been clarified. Originally organized in 1924 as the Board of Tax Appeals,[6] and intended to function mainly as a judicial body, the Board nevertheless, at that time, could not render a final judgment. After losing before the Tax Board, the taxpayer could still pay the tax as determined by the Commissioner and litigate de novo in a court of record; or the Commissioner could still file a suit for collection of the full tax. Two years later, the right to a full second hearing was eliminated,[7] and Congress began to realize that it had, in effect, created a court.[8] Finally, in 1942, even its name was changed. It then became known, officially, as the Tax Court.[9]

It is not surprising that there also were, during this period, several

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[1]H.R. Rep. No. 179, 68th Cong., 1st Sess. 7 (1924).

[2]Int. Rev. Code of 1954, § 7441.

[3]Reo Motors, Inc. v. Comm'r, 219 F.2d 610 (6th Cir. 1955); Stern v. Comm'r, 215 F.2d 701 (3d Cir. 1954); Babcock & Wilcox Co. v. Pedrick, 212 F.2d 645 (2d Cir. 1954), *cert. denied*, 348 U.S. 936 (1955).

[4]Lasky v. Comm'r, 235 F.2d 97 (9th Cir. 1956), *aff'd per curiam*, 352 U.S. 1027 (1957); Bahen & Wright, Inc. v. Comm'r, 176 F.2d 538 (4th Cir. 1949).

[5]Anderson v. Comm'r, 164 F.2d 870 (7th Cir. 1947); Lincoln Elec. Co. v. Comm'r, 162 F.2d 379 (6th Cir. 1947).

[6]Revenue Act of 1924, ch. 234, § 900, 43 Stat. 336.

[7]Revenue Act of 1926, ch. 27, § 200-325, 44 Stat. 10-87.

[8]See Emery v. United States, 27 F.2d 992 (W.D. Pa. 1928); Old Colony R.R. v. United States, 27 F.2d 994 (D. Mass. 1928).

[9]Revenue Act of 1942, ch. 619, § 504(a), 56 Stat. 798, 957.

judicial examinations of the status of this body. In *Old Colony Trust Company v. United States,*[10] the Supreme Court held that the circuit courts of appeal could entertain a petition to review the decisions of the Board of Tax Appeals, since the review functions of those courts were to be purely judicial in nature. Although *Old Colony* has been taken to have settled the question that the Board was strictly an executive agency,[11] it was decided before the 1926 act was passed, and addressed itself primarily to the question of whether there was a need for the tribunal to have power to award execution in order to render its decision ripe for review. (*Old Colony* held, of course, that there was no such requirement.) It is curious how often the case has been cited to support some denial or acceptance of asserted judicial power in the Tax Court.[12]

But notwithstanding, questions have continued to arise concerning the Tax Court's "judicial" power. In *Board of Tax Appeals v. United States ex rel. Shults Bread Company,*[13] the Circuit Court of Appeals for the District of Columbia held that the Board had power to allow the Commissioner to file an answer after the sixty-day period provided for in its rules. The court states that the rules could be modified as "the ends of justice seem to require. . . ."[14] But when an appeal from the Tax Court is not timely filed, the Tax Court is without power to vacate its decision on the ground of excusable neglect.[15] Conflict existed among various circuits on that point,[16] but the Supreme Court's per curiam affirmance *Lasky v. Commissioner,*[17] seems perhaps to have settled the matter.

The Tax Court's claim of "inherent" judicial power has been upheld in other circumstances. In *Fairmont Aluminum Co. v. Commissioner,*[18] the Tax Court's holding that collateral estoppel is fully available to it was affirmed; the court said that it was "not tenable" to suggest that it was other than a judicial body.[19] Be that as it may, the Tax Court was definitely held to be without jurisdiction to apply a prior overpayment to a present deficiency.[20]

Perhaps the most widely litigated question, however, concerning the nature of the Tax Court, has been the scope of review. In *Dobson*

[10]279 U.S. 716 (1929).

[11]*Id.* at 725.

[12]*E.g.,* Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933).

[13]37 F.2d 442 (D.C. Cir. 1930), *cert. denied,* 281 U.S. 731 (1930).

[14]37 F.2d at 443.

[15]Lasky v. Comm'r, 235 F.2d 97 (9th Cir. 1956).

[16]See Reo Motors v. Comm'r, 219 F.2d 610 (6th Cir. 1955).

[17]352 U.S. 1027 (1957).

[18]22 T.C. 1377 (1954).

[19]*Id.* at 1384.

[20]Comm'r v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943); United States *ex rel.* Guard Trust Co. v. Helvering, 301 U.S. 540 (1937).

v. Commissioner,[21] the Supreme Court attempted to limit the scope of review to questions of law. Findings as to questions of fact were to be allowed to stand so long as there was "warrant in the record."[22] As is well known, the attempt failed and in 1948, Congress specifically prescribed that decisions of the Tax Court are reviewable in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.[23]

Notwithstanding all this, the aura of uncertainty surrounding the status of the Tax Court seems to have attracted relatively little attention. Presumably this is attributable to a fairly widespread belief that, at worst, the tribunal is improperly lodged in the executive branch of the government. Also, the strict limitations on the president's removal powers within the statute,[24] coupled with the requirement that they must be strictly followed,[25] seemed to render this of relatively minor importance. The grounds for removal, however, are quite broad, "inefficiency, neglect of duty, or malfeasance in office."

However, the 1962 decision of the Supreme Court in *Glidden Company v. Zdanok*,[26] has changed all that. The majority were of the opinion that the Court of Claims and the Court of Customs and Patent Appeals were tribunals created under article III for reasons discussed below. This is of considerable significance in the present context. The Tax Court is analogous to the tribunals involved in *Glidden*, and while the holding of that case only considered what Congress *may* do, it sheds interesting light on what Congress *may not* do.

It now appears that if, in fact, Congress in establishing the Tax Court was acting pursuant to its power to create "inferior tribunals," serious constitutional questions arise concerning its failure to endow the judges of that court with life tenure and undiminishable salary. These questions involve an extended examination of several constitutional provisions,[27] all of which are more fully discussed below.

II. Separation of Powers

Article III, section 1 of the Constitution says:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

[21] 320 U.S. 489 (1943), *rehearing denied*, 321 U.S. 231 (1944).

[22] 320 U.S. at 501.

[23] Int. Rev. Code of 1954, § 7482.

[24] Int. Rev. Code of 1954, § 7443.

[25] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926). For an early view of the relative unimportance of the *Myers* decision, see Rogers, *The Independent Regulatory Commission*, 52 Pol. Sci. Q. 1, 7-8 (1937).

[26] 370 U.S. 530 (1962), *rehearing denied*, 371 U.S. 854 (1962).

[27] U.S. Const. art. III, §§ 1 & 2; U.S. Const. art. IV, § 2; U.S. Const. amend. V.

> may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

And section 2 says further that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; . . .

It was stated earlier that a great deal of confusion exists concerning the extent of the Tax Court's judicial power. On the other hand, there seems no question that whatever powers it does possess are judicial. The Tax Court has stated its own position in the *Fairmont* case:

> Whatever label might be used to characterize this Court for various purposes, its procedures are, and were intended by Congress to be, in every sense of the word, judicial. . . . We hear and decide only real controversies between adverse parties, following procedures that are inherently judicial. We make no independent investigation of the facts as do some agencies labeled "administrative" either upon our own motion or upon the motion of one of the parties; our findings of fact are based solely on evidence submitted to us by the parties in accordance with prescribed rules. We do not appear as parties in Court to enforce our orders or the law as do so-called administrative agencies. Our findings of fact carry the same weight as those made by a District Court sitting without a jury.[28]

The House Committee on the Judiciary has stated similarly that: "The Tax Court of the United States is already a court in both name and fact, exercising purely judicial functions. . . ."[29]

The same opinion has been voiced countless times by the courts of appeal, appellate and Tax Court judges off the bench, by attorneys of the Justice and Internal Revenue Departments and by Congress. On the other hand, there is apparently no opinion to the contrary.

Although the Tax Court is still described as "an independent agency in the executive branch of government," its decisions and functions during its entire existence have been wholly judicial; and at no time has it ever had any discretionary, policy-making, investigatory, regulatory, advisory, or other comparable functions or duties, which indicates an administrative or executive body, as contrasted with a judicial body.

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[28]Fairmont Aluminum Co. v. Comm'r, 22 T.C. 1377, 1384-85 (1954).

[29]94 CONG. REC. 8501 (1948).

A. Courts and Judges

Webster defines a court as:

(1) The place where justice is administered;

(2) The persons duly assembled under authority of law for the administration of justice;

(3) A tribunal established for the administration of justice; and

(4) The session of a judicial assembly.

Today, however, the average man envisions a court as a place where a man called a judge decides who is telling the truth and also what laws are applicable to the case or controversy being decided by him.

A judge is a man who performs judicial functions. But what are judicial functions? Broadly that would be deciding questions of fact and questions of law. In addition to this, there are some minor administrative duties. But basically, a judge is one who devotes his time and energy to deciding what the facts are in the controversies which are placed before him and in deciding what law is applicable to the facts which he determines exist.

By law, we mean the Constitution of the United States, the constitution of the state in which a state court judge presides, congressional acts, applicable state statutes, municipal ordinances, or for that matter, any authorized legal enactments. In addition to this, in those states that adopt the common law, it is the judge's duty also to be aware of what the common law is when it is applicable to the situation with which he is faced. Of course, this definition applies mainly to lower court judges or trial judges. An appellate judge is one whose concern is mainly with deciding questions of law; only rarely does he concern himself with determining what the actual facts might be, as this is the function of the lower court judge. As a rule appellate courts take the position that they will not decide controversies that have not been previously adjudicated by a lower or inferior court.

Experience has enabled us to pinpoint certain acts as being basically judicial—those which are performed by a judge. They include the following:

(1) The power to enter final judgments;

(2) The power to enter final judgments which would be subject to review by a proper appellate court;

(3) The power to determine facts by using recognized rules of evidence;

(4) The power to judge by the demeanor of the witness whether or not he is telling the truth; and, of course, the power to determine just how much of the witness' testimony is worthy of

belief and how much is not. (Theoretically, if the judge is guided by the rules of evidence and if there is anything in the record made before him which substantiates his findings, his power of determining facts in the particular controversy before him is exclusive and higher courts will not review his fact finding); and

(5) A judge also has the power to determine what the law is; and by this, of course, we mean what law is applicable to the particular controversy he is deciding. His job is not merely to pick out the law or laws applicable to the case before him, but it is within his power to construe the meaning of that law.

Since we know that we are bound by many laws, it is important that we know which are the supreme laws or the most powerful laws. As of this writing, it is generally conceded that the supreme laws of the land is the Constitution of the United States. The people of this country are bound next by all congressional acts passed within the confines of the powers granted to Congress by the supreme law—the Constitution of the United States. Then we have our various state constitutions, statutes passed pursuant to the state constitutions, the common law, and municipal ordinances. The most powerful law that we have, however, as stated above, is supposedly the Constitution of the United States.

A man who decides real controversies between adverse parties is known as a judge and the name of the tribunal describing the battleground for the determination of both fact and law is called a court.

We should like to point out at this time that the judges of the Tax Court of the United States perform *only* judicial functions as outlined above; they perform no non-judicial functions. Those that perform judicial functions have historically exercised their duty as part of the judicial branch of the government. This, of course, is true whether the judicial functions are performed on either a federal or state level.

The difficulty in recognizing a "judicial function" has frequently been mentioned, but then the phrase is usually being used in a different context. While it may well nigh be impossible to say that certain matters ought, by their nature, to be handled judicially, it is frequently not difficult to say when something is, in fact, *being* handled judicially.

If it be assumed that the federal district courts are within their constitutional power to hear tax cases, then the adjudication of such cases in the same manner as exists in those courts must be assumed to be judicial work. While there are some differences in procedure in the Tax Court and the district courts, they surely must be considered relatively minor in nature. In both tribunals:

(1) Proceedings are adversary;

(2) Proceedings are in accordance with set rules of procedure and evidence;

(3) Judges perform judicial functions;

(4) They enter opinions, decisions, final judgments;

(5) The courts' findings are based on questions of fact and law;

(6) Proceedings are presided over by judges who decide only real controversies;

(7) There is appeal to the court of appeals; and

(8) Judges do not perform non-judicial functions.

Interestingly, the fact that the government has monetary dominion in a district court proceeding and not in a Tax Court proceeding designates the latter as even more classically judicial. There was, at one time, some question as to the justiciability of suits for refunds because of the unenforceability of money judgments against the government.[30] While this has never been considered a major problem, the question does not even arise in Tax Court proceedings.

So the existence of the Tax Court raises the issue just about as sharply as it can be presented—and it is—whether article III imposes any restriction upon Congress' power to set up a fully judicial tribunal and at the same time withhold the constitutional guaranty of tenure and salary from its judges.

To say that a presumption in favor of the separation of powers is rebuttable is not to deny that it exists. Some might argue that the presumption, really, is the other way—that the separation of powers is but a necessary evil; but the fact remains that articles I, II, and II contain much that is quite specific. The presumption spoken of here is constitutional, not necessarily ideological. Congress still must have a legislative purpose behind its investigations; government employees have considerable judicial safeguards against summary dismissal by the executive; and the courts must be generally sought for the enforcement of contempt citations. If enough is at stake, the separation of powers is quite meaningful.[31]

B. The Argument of Necessity

What, then, is the need for the present Tax Court? The answer that readily comes to mind is speed in the collection of revenue. Although the problem is deeper, it should not go unremarked that it is difficult to see why a judge without a guaranteed life tenure should

[30]See opinion of Taney, D.J., in Gordon v. United States, 117 U.S. 697, 702 (1864). *But see* Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123 (1927).

[31]See, *e.g.*, Springer v. Philippine Islands, 277 U.S. 189 (1928); McCray v. United States, 195 U.S. 27 (1904); Kilbourn v. Thompson, 103 U.S. 168 (1880).

speed the revenue collection process. That is, perhaps, an overly reductive argument; but the proposition which produced it is not a little reductive in itself.

The history of the Tax Court, briefly outlined above, shows that it was originally intended to be just another step in the administrative collection process. The simple fact is that it just did not work out that way; although the band has ceased playing, the dancers have remained on the floor.

Today, Tax Court litigation takes about the same length of time as district court or Court of Claims suits.[32] Most tax litigation is in the Tax Court. In 1959 the cases pending in the Tax Court involved $920,046,748.00 as against $446,673,640.00 in the federal district courts and Court of Claims.[33] So, ultimately, the "need" argument becomes nothing more than a logical fallacy: major premise—the United States must insure the speedy collection of revenue; minor premise—it can therefore establish the necessary tribunals to accomplish this; false conclusion—having the power to do that, it does not matter whether that end is in fact accomplished. Since its power was originally based on need, the proposition obviously fails.

C. The Argument for Expertise

There may well be a need for expertise, of course. But as to that matter, suffice it to say that this in no way conflicts with independence. If it be intended that a judge operate within a narrow, highly specialized field, there is even more reason to isolate him politically. Objection might here be raised that if he were given article III status he might then be transferred to some non-specialized court. In the first place, however, there is nothing in article III that requires such a transfer, and in the second place, as the Court said in *Glidden*,

> To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other areas beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been devoted to patent, tax, antitrust, or any other specialized field of law in which many eminently well-qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.[34]

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[32]See Beaman, *When Not to Go to the Tax Court: Advantages and Procedures in Going to the District Court*, 7 J. TAXATION 356 (1957).

[33]Flora v. United States, 362 U.S. 145, 175 (1960).

[34]370 U.S. 530, 584-85 (1962).

In fact, the argument as to need, on net balance, really favors a fully independent Tax Court. The Internal Revenue Code is one of the most precise, detailed statutes on the books. The last thing a Tax Court judge would be expected to consider are the government's need for revenue and the socio-economic structure of the nation. The Tax Court was designed to render corrective, not distributive, justice. It was intended to be a full check on the Internal Revenue Service. If sympathy towards the latter's aims and objectives is any part of its function, a great many taxpayers have been ill-advised not to go ahead and pay the tax and receive an impartial hearing in a district court or the Court of Claims.

D. An Examination of Article III and "Judicial Power"

If the foregoing are to be constitutional, rather than legislative, considerations, article III must in some way limit the power of Congress to distribute judicial functions. It has, of course, long been believed that article III does not delineate the distribution of judicial powers.[35] No contention along these lines is made here. Indeed, the instant question is not whether Congress may generally abrogate it, only whether Congress may limit that power by simply withholding judicial independence as it wishes.

It has been assumed here that article III does have an effect on the "separation of powers." Indeed, it has always been accepted as other than merely a guaranty of tenure for a certain group of people. But insofar as article III relates to the separation of powers, it has seemingly been used as a shield rather than a sword. Courts have refused to accept business;[36] but when they have insisted that certain business is theirs, reliance has been placed almost wholly on the due process clause rather than upon article III.[37]

However, the fact that the "judicial power" spoken of in article III has not been held to extend beyond what Congress has stated seems to be the result of a failure to raise the question in such a form that the issue *had* to be resolved. The Constitution does say that "The Judicial Power shall extend to . . . Controversies to which the United States shall be a Party. . . ."[38] Congress is really permitted no discretion.

It has never been a favored interpretation to say that "extend to" means only "touch"; nor does the reading of "party" as "party plaintiff" hold good today.[39] This approach was used in *Williams v. United*

[35]Sheldon v. Sill, 17 U.S. (8 How.) 441 (1849).

[36]See Muskrat v. United States, 219 U.S. 346 (1911).

[37]Crowell v. Benson, 285 U.S. 22 (1932); Ng Fung Ho v. White, 259 U.S. 276 (1922).

[38]U.S. Const. art. III, § 2.

[39]370 U.S. 530 (1962).

States[40] as an attempt to reconcile the broad language of article III with sovereign immunity. Entirely apart from the fact that it is no more attractive to completely restrict article III, the whole notion of drawing an absolute distinction based upon plaintiff-defendant is not sound, certainly not when the government is the adversary party. Indeed, a party contesting an assessment in the Tax Court is, in a very real sense, defending an action. It is unquestionable that his attitude toward the proceeding is more that of a defendant than a plaintiff. He can hardly be considered the initiating party in the normal sense of that term.

E. Debates at the Constitutional Convention Over Allocation of Federal Powers

It should go without saying that if the contours of article III are so indefinite as not to accommodate judicial interpretation it is not the result intended by the framers, but rather, evidence of a failure on their part. The dangers of a non-independent judiciary were too well known to those men to suspect that the case be otherwise. But neither was their confidence in the judiciary so great as to render tenable the conclusion that there exist only exhortatory comments about judicial independence, indicating a desire to leave the refinements of article III wholly within the custodianship of the courts.

Of course, during the Constitutional Convention the phrase "judicial power" never was expressly defined. Most of the debate over article III, in fact, concerned the allocation of jurisdiction between the states and the federal government. The early resolutions were almost certainly made with that issue primarily in mind. Thus, Randolph's original proposal was very broad, "That the jurisdiction of the National Judiciary shall extend to cases which respect the collection of the National revenue; impeachments of any National officers and questions which invoke the National peace and harmony."[41] Warren states that "the Convention understood the entire Resolutions of Mr. Randolph to be a mere sketch in which omitted details were to be supplied. . . ."[42] But more specifically, in fact, it was finally James Wilson's draft that become the model for Section 2,[43] and of course, it was even less detailed than Randolph's resolution.

There was very little debate on the whole subject of what federal powers were to be considered judicial. Hamilton in the *Federalist* (No. 88) addressed himself to the state-federal conflict when he wrote, "Still less need be said in regard to the third point (cases to which the United

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[40]289 U.S. 553 (1933).

[41]WARREN, THE MAKING OF THE CONSTITUTION 330 (1929).

[42]*Id.* at 331.

[43]*Id.* at 535. See 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 172 (1911).

States is a party). Controversies between the Nation and its members or citizens can only be properly referred to the National tribunals." But the nature of the controversy over federal-state allocation of jurisdiction itself begins to give some indication of the framers' intent. However clearcut it may have seemed to Hamilton that tax matters or other questions involving federal laws were properly referrable in the first instance only to federal courts, not all the delegates were of the same opinion. Paterson's plan called for a supreme tribunal which was to have only appellate jurisdiction (from state courts) in cases "which may arise on any of the acts for regulation of trade or the collection of the Federal revenue."[44] Charles Pinckney's earlier plan was similarly structured.[45]

Thus, a very real controversy existed over whether even strictly federal matters were to be originally litigated in federal courts. In this posture, the ultimate broad-based grant of jurisdiction to the federal system no longer supports the inference that the framers did not intend to utterly prevent the circumvention of the courts. If there had been extended debate on the allocation of powers between federal courts and the other federal branches, then the failure to spell out those powers with precision *would* have tended to show that they were based on confidence. Precisely because nothing like that appears, the opposite conclusion, *i.e.*, that it was automatically assumed that a comprehensive construction would be given the section, seems to be more plausible.

Even more significant are the implications of the compromise itself. The delegates who were suspicious of federal judicial power were hardly less suspicious, indeed, probably more so, of any other federal power. The article that ultimately yielded certain powers to the courts after so much debate, it seems, cannot be assumed to have yielded such power to the other branches without discussion. The final, careful delineation of the powers of Congress, as opposed to the far broader grants originally suggested, tend to support this conclusion.

Indeed, it begins to appear that the delegates were under the assumption that if a matter were presented in such a form that it could go to the judiciary, then it must do so. On the one hand, it does not seem sensible to suppose that there would have been a hard-fought attempt to preserve state court jurisdiction if these courts could be circumvented by transferring their potential dockets to tribunals which were not in the nature of independent courts. On the other hand, the agreement that such cases were to be heard by the federal judiciary cannot be supposed to amount to a grant of power to the executive or legislative branches.

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[44] WARREN, *op. cit. supra* note 41, at 329-30, 535.

[45] *Ibid.* See Madison's Notes of the Debates in 2 FARRAND, *op. cit. supra* note 43, at 45-46.

III. Rights, Remedies, and Interpretations Under Due Process

In the eighteenth century, suits to restrain the collection of a tax were not unknown. True, equity jurisprudence held that the chancellor could neither determine the deficiency nor enforce collection if he found for the revenue man. But for an individual who was mainly interested in a hearing before payment, this was not disadvantageous. In 1867, the remedy was virtually abolished, and the real constitutional questions involved had been adequately answered twenty-two years earlier, in *Cary v. Curtis.*[46] That case was decided on the fact that other remedies remained open to the contestant, just as they did in tax matters. But one remedy can be far more attractive than another, as is readily evidenced by the voluminous litigation in the Tax Court as contrasted with that in the district courts and Courts of Claim.

If the question involved is the general preservation of the judicial power, as opposed to the litigant's right under due process to a hearing in a constitutional court, alternative remedies become irrelevant.

If the "judicial power" is being exercised in Tax Court proceedings, then "controversies to which the United States shall be a Party" must receive a broad interpretation. Reference has already been made to the attempt in *Williams* to read the phrase as "party plaintiff." That interpretation was rightly rejected in *Glidden,* not only because of the frequently unrealistic nature of the distinction, but because the premise on which it was based was incorrect. It was believed in *Williams* that such a reading was necessary in order to avoid the destruction of sovereign immunity. In demonstrating the fallacy of that reasoning, the United States, in its amicus curiae brief filed in *Glidden,* pointed to several pertinent considerations in interpreting the phrase.[47]

First, it may well be that though jurisdiction *may* lie to sue the United States, a waiver of sovereign immunity is still a prerequisite just as is proper service and many other conditions precedent. Secondly, an early decision[48] impliedly assumed that determination of claims against the government can be judicial business, but must be presented to the courts in accordance with the requirements of article III; thirdly, there is nothing in the constitutional debates that indicates an intent so to limit the phrase, and the plain meaning is obviously to the contrary.[49] This latter consideration, plus the fact that so much judicial practice has been based on the reading that "party" was not so limited, undoubtedly caused *Williams* to be disapproved in *Glidden.*

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[46]15 U.S. (3 How.) 236 (1844).

[47]Brief of the United States as Amicus Curiae, pp. 77-87, Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[48]Hayburn's Case, 2 U.S. (2 Dall.) 411 (1792).

[49]Brief of the United States as Amicus Curiae, pp. 77-87, Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

The interpretation here argued would thus present Congress with a dilemma. If it wished to allow a judicial determination, it must allow it in an article III court of record. Before a discussion of whether that would be tenable, and if so, in what manner, one other point must be considered.

It is generally conceded that however restrictive be the congressional choice as to the creation of certain tribunals, other situations exist in which Congress' power is "plenary." The original theory of legislative courts was, in fact, based on such a distinction when Marshall stated in *American Insurance Company v. Canter*[50] that, "[Territorial courts are] created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States."

The power to create special non-independent tribunals, as stated in *Glidden*, depends on

> the need to exercise the jurisdiction then and there for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlled.[51]

Furthermore, as *Crowell v. Benson*[52] indicates, notions of due process are so strongly influenced by the separation of powers that it is possible that one challenging the Tax Court is proceeding partially under the fifth amendment. In this regard, it is not amiss to suggest one other possible violation of due process.

However fair might be the procedure followed by the Tax Court, the fact remains that the litigant suing in the district court has a better remedy. However appropriate might be the end (to save time and money), the means (giving a taxpayer a remedy about as slow as in the district courts) hardly seems to achieve it.

We maintain that due process of law must always expand and is possessed of certain general maxims which are inherent if justice is to properly administered. Some of these maxims, resolved through the years, are:

(1) No man may sit in judgment on himself;

(2) The same law is to be administered and construed for both rich and poor;

(3) The prosecutor and the judge may not be one and the same person;

[50]American Ins. Co. v. Canter, 7 U.S. (1 Pet.) 511, 546 (1828).

(4) One who has an interest in the controversy may not be the judge who is deciding that controversy; and

(5) The rich and the poor are entitled not only to the same substantive rights, but the procedural aspect of the law must likewise be the same for all, regardless of condition of class, race, or creed.

IV. The Argument for Article III Status

Our proposition then is that article III judicial power is exercised whenever a tribunal is acting like an article III court. It is exercising that power improperly when its judges do not have article III status. Under the theory of separation of powers, if a function is judicial in nature, it is best performed by an independent judiciary. If, for any forthright reason, an independent judiciary is not desirable, it will be seen that the function involved is not entirely judicial.

Article III did not demand the creation of courts, but provided for certain attributes in those courts which, it was anticipated, would be created readily enough. (There were farsighted delegates who realized that the situation, *i.e.*, that the judiciary would protect property interests and Congress would protect the people generally, might not always do so. But if their fears were to be allayed, it was to be effected primarily through the Bill of Rights.)

Indeed, it really is no answer to say that the framers could not foresee the expanded nature of the commerce clause nor the many agencies created as a result thereof. If this theory is correct, we may apprehend that they very well foresaw a situation similar to the creation of the Tax Court. That tribunal was established to "relieve the hardship" of having to pay a tax initially and then sue for a refund. The popular desire was satisfied; and as continually more litigation came to the Tax Court,[53] the erosion of the independent judiciary began.

Besides, even though any argument based on separation of powers envisions conflict between coordinate branches of government, the idea can be carried too far. Although this interpretation means that an act of Congress would be stricken, it should be recalled that when the Board of Tax Appeals was originally established, a different interpretation of the Constitution prevailed than exists at the present time. Moreover, during part of the existence of that tribunal, Congress had seen attempts to create other article III tribunals fail.[54] At the very least, it

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[51]370 U.S. at 547-48.

[52]285 U.S. 22 (1932).

[53]See, *e.g.*, Flora v. United States, 362 U.S. 145 (1960).

[54]Williams v. United States, 289 U.S. 553 (1933); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

was reasonably assumed that there was no major constitutional problem involved in establishing a Tax Court as an executive agency; there is virtually no discussion thereof.

General history, in fact, reveals a disposition on the part of Congress to give specialized courts full judicial status, and not to read article III as restrictively as possible. The specific question in *Williams* was the interpretation of a statute which provided for the reduction of judges' salaries, "except those judges whose compensation may not, under the Constitution, be diminished. . . ."[55] There Congress was quite willing to leave the matter to the judiciary.

There have been, moreover, several specialized courts which were specifically created under article III, including the ill-fated Commerce Court[56] and the Emergency Court of Appeals.[57] In 1953, Congress declared its intention that the Court of Claims be fully independent;[58] and in 1958, it declared a similar intention with regard to the Court of Customs and Patent Appeals.[59] Today, only the Tax Court stands alone as a permanent but not an independent judicial tribunal.

As a matter of fact, far from a strong desire to keep the Tax Court in the executive branch, there have been several suggestions for its establishment as a court of record (although the arguments therefore have not included the constitutional compulsion). The bill to repeal the *Dobson* decision, H.R. 3214, also included a provision to transfer the Tax Court to the judiciary. It was reported favorably out of committee and the majority were in favor of it. Congressman Hays said:

> Our position is impregnable from the standpoint of logic and constitutional intent, yet because of certain incidents in the peculiar history of this splendid court, it is classified technically as an agency of the executive branch. No one can question the fact that it is a court legislatively established as prescribed by the Constitution. . . . Our concurrence with the Senate perpetuates one of the strongest anomalies in the Government.[60]

The transfer was never made, because the Senate had already voted merely to change the *Dobson* decision, and that was considered the most pressing matter. The question of tenure was not debated, but it very well might have been if there had been the slightest charge of unconstitutionality. "Legislative" judges with limited tenure are about as unusual as "executive" commissioners appointed for life.

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[55]Act of June 30, 1932, ch. 314, § 107(a)(5), 47 Stat. 382, 402.

[56]Act of June 18, 1910, ch. 309, §§ 1-5, 36 Stat. 539-43.

[57]Act of June 30, 1942, ch. 26, § 204, 56 Stat. 23; see Locherty v. Phillips, 319 U.S. 182 (1943).

[58]28 U.S.C. § 171 (1958).

[59]28 U.S.C. § 211 (1958).

[60]94 Cong. Rec. 8501 (1948).

Perhaps the most apt commentary on how the Tax Court views its own position can be seen in the following excerpt from the testimony of the Chief Judge of the Tax Court, John Murdock, made during his appearance before the House Subcommittee on Appropriations in 1959:

> I think we should be [in the judicial branch], but we have been blocked a couple of times when we came awfully close. I think we should get away from the tag of 'independent agency in the executive branch of government' because *that is misleading.* I think we have risen above it. It is misleading and at times *it is embarrassing.*

Also, the Attorney General's Committee on Administrative Procedure classified the Tax Court with the Court of Claims and Court of Customs and Patent Appeals since 1941, and has described it as "a court in all but name."[61]

Beyond the fact that a transfer to the Tax Court to the judiciary would simply recognize the realities of the situation, other reasons have been advanced. They include ease of obtaining annual appropriations (since this matter would be handled through the Office of the U.S. Courts instead of individually as with other executive agencies); ease of obtaining hearing rooms when outside of Washington, D.C.; avoiding questions of the applicability of the Administrative Procedure Act;[62] applicability of the Federal Rules of Civil Procedure; and increased respect for the Tax Court as a judicial institution.[63] Presumably, a litigant would also have a greater assurance of his rights on appeal.[64]

The distressing fact in all this is not that undiminishable salary and lifetime tenure have been persistently disregarded, but that neither Congress nor the Bar nor the commentators have given the matter any consideration at all. This aspect of the situation seems to have been completely overlooked. Hence if the constitutionality of the law creating the Tax Court is upheld, it would be tantamount to saying that contrary to article III, section 1, Congress may create a judicial entity with judges devoid of life tenure and of undiminishable compensation, *i.e.*, a court of inferior jurisdiction.

The result has been an enormous disproportion of decisions by the Tax Court in favor of the Government. This is borne out by the following comparative table of cases as reported by the Commissioner of Internal Revenue in his report for 1962.[65]

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[61]24 GEO. WASH. L. REV. 619 (1956).

[62]60 Stat. 237, 5 U.S.C. §§ 1001-11 (1958).

[63]See generally Kilpatrick, *Should the Tax Court Be Made a Court? A Reply to Some Objections,* 9 J. TAXATION 7 (1958).

[64]See Stern v. Comm'r, 242 F.2d 322 (6th Cir. 1957); Stacy Mfg. Co. v. Comm'r, 237 F.2d 605 (6th Cir. 1956).

[65]The suggestions of the Hoover Commission to transfer the Tax Court to the

	Tax Court		Court of Claims		District Court	
	1962	1961	1962	1961	1962	1961
Number Won By Government	275	313	27	17	192	166
Number Lost By Government	93	108	23	24	213	192
Number Partially Won By Government	163	159	6	5	44	39
Percent Won or Partially Won By Government	82%	81%	59%	48%	54%	52%

Prior years reflect a similar disproportion.

The fact that in 1962 the Tax Court decided 275 cases in favor of the Government as against 93 in favor of the taxpayer does not necessarily mean that there have been improprieties. But even if there is nothing more involved than a subconscious identification in the mind of some of its judges with the governmental department of which the Tax Court is a part, then the harm which the framers of the Constitution sought to avoid has already been done. Granted that it may be impossible to prove this, yet for this very reason—to assure a completely independent judiciary—the restrictive provisions of article III, section 1, as to life tenure and compensation should be strictly observed by the Congress. The integrity of the judicial system must be maintained.

Returning once more to the philosophy that created the Tax Court, and conceding its excellence and commendability, its true purpose will never be realized until it has been granted the status of an article III court with its judges assured of life tenure. Its judiciary will then be invested with the same freedom and authority as is possessed by those judges in the federal courts. As matters stand now, it is less than article III court in name only. The time has come to make it one in fact.

V. Conclusion

A judge sitting in the Tax Court performs judicial functions, viz., he determines the facts; he decides questions of law; rules on the admissability of evidence; exercises discretion as to procedural matters; presides in real controversies between adverse parties; and he enters final judgments, which judgments are subject to appeal to the United States courts of appeals. Is there any logical or legal reason that the trial for a taxpayer in the federal district court should be any different

judiciary were coupled with a further suggestion that the judiciary functions of the NLRB and the ICC be transferred to similar tribunals; see MacNeill & Metz, The Hoover Reports, 80-81.

from the trial for that same taxpayer in the Tax Court? Does not this distinction without a reason do violence to the separation of powers theory? In effect, is not a taxpayer in his suit in the Tax Court being judged by a judicial branch of the government in name only, but in reality, subject to the will of the executive branch under the guise of an "administrative agency"? Does this do violence to the principle that the same branch of government should not be the prosecutor and the judge in the same case?

The framers of our Constitution, to prevent just such situations, said:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[66]
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party. . . .[67]

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[66]U.S. CONST. art. III, § 1.

[67]U.S. CONST. art. III, § 2.

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Student Comments

APPORTIONMENT OF CONGRESSIONAL DISTRICTS, THE CONSTITUTION AND THE COURTS

I. Doctrine of the Separation of Powers

People have almost always sought to impose their thoughts and desires upon the policies and functions of government. Almost from the very beginning of history men have sought protection from the arbitrary exercise of power by their governments. The Magna Carta gave the barons the ultimate right to bear arms against the Crown if they could not obtain satisfaction through a grievance committee.[1] Much later Montesquieu wrote that "every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[2] It became necessary "from the very nature of things that power should be a check to power."[3] He intended that no single branch of the government—executive, legislative, or judicial—should become supreme, but that all three should interact to insure protection of the citizenry against the arbitrary exercise of power.[4]

By 1787 when the Constitution was drafted, the judicial power, which had developed under the common law, the legislative power, and the executive power each had evolved into a well-defined concept so that there seemed to be no necessity for specifically designating in detail the powers and duties of each of the three branches.[5] No one intended that the three branches "ought to have no *partial agency* or no *control* over the acts of each other."[6] The principles of a free constitution would be violated only where the whole power of one department would be exercised by them who possessed the complete power of another department.[7] Originally the doctrine was rather flexible in concept, but during the nineteenth century a more rigid attitude developed. In recent years the original view has been revived.[8] For example, the delegation of rule-making powers to administrative agencies permits divisions of the executive branch to exercise legislative powers; and administrative tribunals in the executive departments have been created

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[1]Dickinson, The Great Charter 28 (1955); Article 61 of the Magna Carta.

[2]Montesquieu, Esprit des Lois 150, bk. XI, c. 4 (rev. ed. Nugent transl. 1900).

[3]*Ibid.*

[4]Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 602 (1957).

[5]Fox, *Separation of Powers*, 5 Wash. & Lee L. Rev. 185, 186 (1948).

[6]The Federalist No. 47, at 301-02 (Lodge ed. 1888) (Madison).

[7]*Id.* at 302.

[8]Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 603 (1957).

to perform judicial functions. Such liberalities of interpretation are justified so long as the objective of the doctrine of separation of powers —to protect against the arbitrary exercise of power—is not violated.[9]

II. The Grand Depository of the Democratic Principle

With the doctrine of the separation of powers firmly in mind the drafters of the Constitution created a bicameral legislative branch of the federal government. The United States Senate was to represent the states, but the House of Representatives was to represent the people.[10] The belief in the desirability of this plan of representation, which represented a major compromise between the large and the small states, was also reflected in the connection between taxation and representation which was often made on the convention floor.[11] The House of Representatives was intended to become "the grand depository of the democratic principle of the government."[12]

Article I, sections two and four of the Constitution were included to insure the inherent democratic nature of the House. Article I, section two provides both that representatives should be apportioned among the states according to population excluding untaxed Indians and requires a reapportionment of representatives every ten years in such manner as Congress shall direct. Article I, section four of the Constitution confers upon Congress the authority to regulate the times, places, and manner of holding elections for representatives. The purposes of the Philadelphia Convention in stipulating that Congress might "make or alter" regulations as to the times, places, and manner of congressional elections were to secure to Congress (1) the power to make any regulations a state might make when a state for any reason should fail to act and (2) the power to act when a state law should be subversive of an equal and fair representation.[13] Since the case of *Ex Parte Yarbrough*[14] these same two sections of Article I have been recognized as protecting the right to participate in the choice of Representatives.

The ad interim House of Representatives established by the Constitution to serve until after the first census had only sixty-five members. The earlier unicameral Continental Congress had had ninety-one members, or seven for each one of the thirteen states. When twenty-six members were taken away to form the new Senate, sixty-five representa-

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[9] *Id.* at 604.

[10] Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1071 (1958).

[11] *Id.* at 1072.

[12] Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 Law & Contemp. Prob. 276, 277 (1952).

[13] *Id.* at 280.

[14] See United States v. Classic, 313 U.S. 299, 323 (1941).

tives remained in the House.[15] They were apportioned among the states according to whatever population figures were available.[16] Congress passed its first apportionment bill after the 1790 census, but this bill became the subject of the first presidential veto. President Washington thought that the bill was contrary to the constitutional provision which limited the number of representatives to no more than one for every thirty-thousand people. He reached this conclusion because he applied the prohibition to each state individually.[17]

III. Regulation of Elections by Congress

It was not until 1842 that Congress regulated the election of Representatives from the states.[18] The Apportionment Act of 1842 provided that representatives should "be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said state may be entitled, no one district electing more than one representative."[19] Although President Tyler approved the enactment of this bill, he doubted Congress's power to command states to make or alter their existing regulations.[20] Some twenty-two states, however, had already employed the method of election from districts by 1842, and some states had previously petitioned Congress to pass an amendment which would provide for congressional elections by districts.[21] In the act of 1842, article I, section four of the Constitution was taken as the source of congressional authority to require state districting for elections to Congress.[22]

The 1850 apportionment act deleted the provision concerning election from districts,[23] but in 1862 Congress again required that elections of representatives be from districts and that these districts be composed of contiguous territory.[24] The same requirement was repeated in 1872, and Congress also required that these districts contain "as nearly as practicable an equal number of inhabitants."[25] Identical requirements

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[15]Willcox, *Last Words on the Apportionment Problem,* 17 Law & Contemp. Prob. 290 (1952).

[16]*Ibid.*

[17]See Messages and Papers of the Presidents 124 (Richardson ed. 1896).

[18]Comment, *Methods for Guaranteeing Equality in Congressional Districts,* 43 Ill. L. Rev. 180, 182 (1948).

[19]5 Stat. 491 (1842).

[20]Schmeckebier, Congressional Apportionment 133 (1941).

[21]Celler, *Congressional Apportionment—Past, Present, and Future,* 17 Law & Contemp. Prob. 268, 272 (1952).

[22]Bowman, *Congressional Redistricting and the Constitution,* 31 Mich. L. Rev. 149, 175 (1932).

[23]Paschal, *supra* note 12, at 281-82.

[24]Celler, *supra* note 21, at 272.

[25]17 Stat. 28 (1872).

were adopted by Congress in 1880 and again in 1891.[26] In the act of January 16, 1901, there was a further provision that the districts should be composed of "compact territory."[27] The Apportionment Act of 1911 repeated these same requirements.[28] Congress did not reapportion in 1920,[29] and it did not pass another apportionment act until 1929. The 1929 act intentionally failed to renew the requirements of contiguity, compactness, and equality of population.[30] It is this same act which is the basis for the present congressional apportionment act.[31]

IV. The State's Function

To the extent that Congress does not regulate the elections of its members, the state controls the election process with its own law. The Constitution provides that the electors of the members of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the state legislature,[32] but the states cannot prescribe the qualification for voters for representatives *eo nomine*.[33] The United States Constitution adopts the state qualifications as those of its own electors for members of Congress. The state remains free within a defined area to designate those classes of citizens which may vote for a representative, but once the state has designated these classes, the United States Constitution guarantees and secures this right to vote to those state citizens who are within the class so designated by the state.[34]

The states have been given a wide discretion in the formulation of a system for the choice by its citizens of who will represent them in the House of Representatives; but when the state uses its power as an instrument for circumventing a federally protected right, it runs afoul of the supremacy clause of the Constitution so that it no longer remains insulated from federal judicial review.[35] For instance, it is beyond the authority of the federal court to question the right of a state to adopt a particular policy; but if in the administration of that policy an individual or class is denied equal protection of the law, it is within the

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[26]Celler, *supra* note 21, at 272.

[27]31 Stat. 733 (1901).

[28]37 Stat. 13 (1911).

[29]Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 550 (1954).

[30]See Wood v. Broom, 287 U.S. 1, 7-8 (1932).

[31]46 Stat. 26 (1929), as amended, 55 Stat. 761 (1941), 2 U.S.C. § 2a (1958).

[32]U.S. Const. art. I, § 2.

[33]*Ex Parte* Yarbrough, 110 U.S. 651, 663 (1884).

[34]United States v. Classic, 313 U.S. 299, 314 (1941).

[35]Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

power of the federal courts to review the administration of that policy.[36]

There are three general barriers to the state control of voter qualifications: (1) race, color, or previous condition of servitude is an impermissable standard by the terms of the fifteenth amendment; (2) sex is an impermissable standard by reason of the nineteenth amendment; and (3) the equal protection clause of the fourteenth amendment operates upon the states themselves. Prior to the adoption of the fourteenth amendment it was impossible for the federal judiciary to question the exercise by the states of their respective powers in the light of the Bill of Rights.[37] The purpose of that amendment was to subject the state's exercise of its sovereign powers to the scrutiny of the federal courts.[38] Where individuals were denied the equal protection of the laws, it was almost always held that a justiciable question was presented.[39] The traditional test under the equal protection clause of the fourteenth amendment has been whether a state has made an "invidious discrimination."[40] If it is possible to conceive of a state of facts which will justify it, the state's statutory discrimination will not be set aside.[41] The equal protection clause requires only that "classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate . . . as to be wholly arbitrary."[42] Direct intrusion by the federal government into the election machinery of the states has taken these forms: (1) investigations;[43] (2) criminal proceedings;[44] (3) suits for declaratory relief and for an injunction;[45] and (4) suits brought under the Civil Rights Act to enjoin discriminatory practices.[46]

The state does not exhaust its function in congressional elections by designating who may vote in these elections. The United States Constitution requires only that representatives reside within the state they represent.[47] Some of the states have further provided by statute that

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[36]Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 611 (1957).

[37]See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[38]*E.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[39]Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 611 (1957).

[40]See Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[41]*E.g.*, McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[42]Walters v. City of St. Louis, 347 U.S. 231, 237 (1954).

[43]Hannah v. Larche, 363 U.S. 420 (1960).

[44]*E.g.*, *Ex Parte* Siebold, 100 U.S. 371 (1879); *Ex Parte* Yarbrough, 110 U.S. 651 (1884).

[45]Terry v. Adams, 345 U.S. 461 (1953).

[46]United States v. Raines, 362 U.S. 461 (1953).

[47]U.S. Const. art. I, § 2.

a representative must reside in the congressional district from which he is elected.[48] Still other states have placed in their constitutions provisions which purport to govern congressional apportionment.[49]

It has been advanced that a state constitution cannot limit the state legislature in apportioning congressional districts because the federal constitution expressly delegates the function of apportionment to the state legislatures. The contrary theory is that the state constitutions can control since the legislatures are not exercising a delegated power because the power to regulate elections is a sovereign power which was left to the states by article I, section four of the Constitution.[50] Even if it is a delegated power, it has been shown that it is delegated to the "law-making body" which in turn is created and controlled by the state constitution so that it would continue to control.[51] The United States Supreme Court has uniformly applied these state constitutional provisions to the redistricting of congressional seats within a state, and it has gone so far as to hold that a congressional redistricting act was subject to a popular referendum in the State of Ohio.[52] Moreover, two state courts have overthrown a congressional gerrymander which violated state constitutional standards requiring approximate equality of population.[53]

V. The Courts and One Man's Vote

Congress clearly possesses a general supervisory power over the election of its members within the several states,[54] but the power of the courts over this matter has until quite recently remained uncertain and subject to confusion. More than two hundred and fifty years ago in England, a right of action to recover damages for the interference with a man's right to vote was established at common law.[55] The United States Supreme Court has consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at Congressional elections."[56] In 1915 the Court held

[48]Tabor, *The Gerrymandering of State and Federal Legislative Districts,* 16 Md. L. Rev. 277, 300 n.115 (1956).

[49]Those state constitutions which expressly purport to govern congressional apportionment are: Cal. Const. art. IV, § 27; Iowa Const. art. III, § 37; Minn. Const. art. IV, § 23; Va. Const. art. IV, § 55; W. Va. Const. art. 1, § 4.

[50]Comment, *Court Review of Congressional Apportionment,* 3 Stan. L. Rev. 129, 135 (1950).

[51]Smiley v. Holm, 285 U.S. 355 (1932).

[52]Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916).

[53]Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932); Moran v. Bowley, 347 Ill. 148, 179 N.E. 526 (1932).

[54]Smiley v. Holm, 285 U.S. 355, 366-67 (1932).

[55]Ashby v. White, 1 Brown 62, 1 Eng. Rep. 417 (H.L. 1703).

[56]*E.g., Ex Parte* Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900); United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385 (1944).

that where the defendants, election officials, agreed that irrespective of the precinct returns being lawful and regular, they would omit them from their count and from their returns to the state election board, there was a violation of section nineteen of the Criminal Code. The statute in no way mentioned voting but instead simply made it a crime to violate a person's constitutional rights, which were defined in the broadest terms. The Court sustained the indictment on the ground that every voter's vote must be counted correctly and reported.[57] In 1944 the Court held that the stuffing of a ballot box by election officials violated the voter's constitutional right to have his vote counted.[58] It has therefore been irrefutably established that one man has the constitutional right to have his vote counted free from any diluting or nullifying effects.

VI. Malapportionment and One Man's Vote

Today, the value of a man's vote for his Congressman depends upon where he happens to reside. If he lives on the Upper Peninsula of Michigan, he votes in Michigan's Twelfth District, which is the smallest in the nation. It has a population of 177,431.[59] If he lives in Dallas, he is a resident of the Fifth Congressional District of the State of Texas which, in keeping with the Texas tradition, is the largest in the nation with the population of 951,525.[60] To the everlasting consternation of the Texan, his vote is worth only about one-fifth of that of the voter in the Wolverine State. The immediate problem, of course, is the apportionment of Congressional votes within the same state. Prior to the decision in *Wesberry v. Sanders*,[61] Georgia exemplified, if not typified, this serious problem. Her Fifth Congressional District was originally a three-county area which embraced Atlanta. Then the second largest district in the nation, it had a population of 823,680.[62] The Ninth Congressional District of Georgia—Georgia's smallest—comprised but 272,154 people.[63] A vote cast in the Ninth District was worth approximately three votes cast in the City of Atlanta.

In the past when government's impact on society was of far less importance, unequal representation could be regarded as of little consequence. In the 1960's the federal government and state governments spend a third of the national income,[64] and they regulate every

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[57]United States v. Mosley, 238 U.S. 383 (1915).

[58]United States v. Saylor, 322 U.S. 385 (1944).

[59]Time, Feb. 28, 1964, p. 20.

[60]*Ibid.*

[61]84 Sup. Ct. 526 (1964).

[62]Time, Feb. 28, 1964, p. 20.

[63]*Ibid.*

[64]Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1096 (1958).

facet of a complex industrial civilization. Of necessity are the consequences of malapportionment more severe and grave now. Moreover, the rapid growth of the nation's population as well as its steady flux in concentration and character urgently demand a regular and equitable adjustment of apportionment within the state congressional districts.

Malapportionment in both the state legislatures and in the congressional districts has an almost universal rural basis so that the most populous districts—and hence most underrepresented—are the urban and suburban areas.[65] Sometimes malapportionment is intentionally used to give to a particular party a decided advantage at the polls and within the legislative halls.[66] The relationship between state legislative malapportionment and congressional district malapportionment is practically unavoidable, if not inescapable, because as Madison wrote:

> [T]he inequality of the representation in the legislatures of particular states would produce a like inequality in their representation in the national legislature, as it is presumable that the counties having the power in the former case would secure it to themselves in the latter.[67]

Madison's idea likely will become less and less descriptive as more and more states are compelled to reapportion their legislatures under the landmark decision in *Baker v. Carr*,[68] but in the meantime the pursuit should be continued for other remedies to the malapportionment of congressional districts.

VII. Malapportionment and the Congress

Mr. Justice Holmes once wrote that the "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts;"[69] but the House of Representatives has revealed no disposition to eliminate malapportionment of congressional districts within a state. In 1951 President Truman recommended certain criteria for apportioning congressional districts, but no action was ever taken on his recommendation.[70] In the Eighty-sixth Congress there was introduced a bill which specified that congressional districts be "compact, contiguous, and relatively equal in population," but the issue was so

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[65] *Id.* at 1064.

[66] See Brooks v. State *ex rel.* Singer, 162 Ind. 568, 578, 70 N.E. 980, 983 (1904).

[67] 5 The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended By the General Convention at Philadelphia in 1787, at 401-02 (Jonathan Elliot ed. 1937).

[68] 369 U.S. 186 (1962).

[69] Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904).

[70] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 551 (1954).

sensitive that the bill never emerged from its legislative committee.[71] The failure of Congress to remedy the malapportionment of congressional districts can be no surprise to a realist because members of Congress understandably have no desire to run the risk of voting themselves right out of the Congressional Office Building.

On two occasions the right of a newly elected member to claim his seat in the House has been challenged because he allegedly represented a malapportioned or gerrymandered district. The basis for this challenge was that provision of the Constitution which constitutes the House of Representatives the judge of the elections, returns, and qualifications of its own members.[72] On both occasions the House refused to exclude them.[73] The committee reports advanced four reasons for refusing to exclude elected members from their seats as a means of enforcing district equality: (1) The action of exclusion would leave the voters of the affected district without any representation for two years. (2) It might lead to politicking on an even larger scale because of a continually changing House majority. (3) Members of Congress would be subjected to constant uncertainty because their seats might at any time become pawns in some party struggle in the House. (4) Occasional challenges to specific seats would be unfair and ineffective; such action should be taken "universally" as to all districts.[74] Election contests are, in addition, so necessarily and unavoidably long that a challenged member may well have served much of his time in the term before the House is ready to act.[75]

Congress cannot justify its failure to act on the ground that it has no constitutional authority to remedy this particular problem. In addition to article I, section four the "necessary and proper clause" of the Constitution gives Congress the capacity to implement the power given it in section four. Under it Congress might impose sanctions or employ an administrative body to implement a congressional requirement that the districts be as equal as possible in population.[76] The apportionment of the administrative body could remain in effect until the state had complied with the standard set by Congress with its own enactments. Although the Constitution has given Congress the authorization to act in this matter, it has not placed that body under any

[71]Taylor, *Legal Action to Enjoin Legislative Malapportionment: The Political Question Doctrine*, 34 So. Cal. L. Rev. 179, 187 (1961).

[72]U.S. Const. art. I, § 5.

[73]Davidson v. Gilbert, reported in Powell, Digest of Contested Election Cases 603-05 (1910); Parsons v. Saunders, reported in Moore, Digest of Contested Election Cases 43 (1917).

[74]Lewis, *supra* note 64, at 1894.

[75]Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle?,"* 17 Law & Contemp. Prob. 276, 289 (1952).

[76]Comment, *Methods for Guaranteeing Equality in Congressional Districts*, 43 Ill. L. Rev. 180, 202-03 (1948).

affirmative sanction to act. Even were the courts to hold that the House of Representatives was under a constitutionally imposed duty to reapportion and to realign malapportioned congressional districts, they would remain powerless to compel that body to do so.[77] As for the executive branch, the President's only duty is to send periodically to Congress a message which sets forth the apportionment of representatives among the states.[78]

VIII. Malapportionment—A Political Question?

It is fundamental that for a court to enter into any controversy, a petitioner to it must claim infringement of an interest particular and personal to himself, so that he may assert the requisite standing to sue. The court must then establish its jurisdiction over the parties and the subject of the suit as well as determine whether the controversy is justiciable. The court can under no circumstances intervene unless the issues in the suit present a "justiciable controversy."[79] A recognized category of non-justiciable controversies is the "political question," which is the necessary product and logical result of the application of the doctrine of separation of powers to the facts of a particular controversy. It is invoked by the court when it is of the opinion that the issue presented in the suit is inappropriate for judicial determination.[80] The case of *Luther v. Borden*,[81] which arose from Dorr's Rebellion in the State of Rhode Island in 1841, was the first important case to apply the doctrine of judicial non-interference with political questions.[82]

No formula exists by which the courts decide what are political questions. It would seem that they decide this issue on a case-by-case process of balancing the reasons against judicial action with the gravity of the injury asserted and the unlikelihood of its cure by non-judicial means.[83] Some fairly well-defined areas do constitute political questions such as international affairs and foreign policy.[84] In other situations the court considers that the particular constitutional duties cannot be judicially enforced because they are only of a moral character. The extradition clause of the Constitution is of such a moral character. This classification, however, seems dubious at best because both the Constitution and congressional acts are legal documents and not moral codes.[85]

[77]Comment, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1018 (1929).

[78]Taylor, *supra* note 71, at 188 n.55.

[79]See, *e.g.*, Stearns v. Wood, 236 U.S. 75 (1915).

[80]See, *e.g.*, Coleman v. Miller, 307 U.S. 433 (1939); Baker v. Carr, 369 U.S. 186, 211-13 (1962).

[81]48 U.S. (8 How.) 1 (1848).

[82]Comment, 37 Harv. L. Rev. 338, 344 (1924).

[83]Lewis, *supra* note 64, at 1081 n.140.

[84]See Baker v. Carr, 369 U.S. 186, 211-13 (1962).

[85]Wagner, *Political Questions in the Federal Judiciary—A Comparative Study*, 32 Temp. L.Q. 135, 148-49 (1959).

Dominant among the considerations of whether an issue falls within the category of political questions is (1) the lack of legal principles to apply to the questions presented and (2) the constitutional requirement of attributing finality of the action or decision to either the executive or the legislative branch of the government.[86] Another test for determining political questions is whether their settlement rests with the electorate so that they are involved in politics in the general meaning of the term.[87] The courts will not decide a case if to do so would seriously embarrass governmental activities of extreme delicacy.[88] Occasionally a court will declare a question to be political which essentially is controversial.[89] The fact that most decisions on political questions are reached by a divided court best indicates that this concept is a confusing and perplexing one.[90]

Confusion persistently continues between suits which present political questions and suits which are concerned with political rights. In a decision concerned with the infringement of the petitioner's right to have his vote counted, Mr. Justice Holmes wrote, "The objection that the subject matter of the suit is political is little more than a play upon words."[91] It is submitted that each of the areas into which the courts refuse to enter is characterized by the policymaking or discretionary nature of the function concerned. The officers granted these discretionary powers are responsible to the people through the sanction of the ballot. Were the courts to interfere in these areas, they would effectively deny the people their right to control the policymaking functions of the government; and they would irreparably transgress the basic purpose of the doctrine of separation of powers by usurping that power which the people have deposited through the Constitution in the other two branches of the federal government.[92]

Where a policy is already precisely defined and has its basis in an interpretation of the Constitution, the issues arising from or about that policy cannot be deemed non-justiciable if the courts have the precedents and criteria by which to determine the solution to the problem created by those issues. The courts would be free to decide and dispose of them as they should see fit, provided they do not collide head-on with the functions of the other two branches of the federal government. Therefore, where there is a settled policy that a citizen has the constitutionally protected right to cast his vote and to have his vote

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[86]See Coleman v. Miller, 307 U.S. 433, 454 (1939).

[87]See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

[88]See, *e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962).

[89]Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 617 & n.105 (1957).

[90]See Wagner, *supra* note 85, at 139.

[91]Nixon v. Herndon, 273 U.S. 536, 540 (1927).

[92]See, *e.g.*, Comment, *Reapportionment: Is It Really a Political Question?* 17

counted accurately in an election for a United States Congressman, the federal courts have the power and the authority to decide and dispose of any suit in which the petitioner alleges that his vote is not being counted equally along with those of his fellow citizens.[93]

IX. The Federal Equity Power

It has been stated that federal courts should be most hesitant to use the injunction in state elections for fear that by attempting to regulate the electoral process within the state, the court might disrupt or paralyze that very system which is indeed vital to the continuation of the state government.[94] The equity court should always remain on the alert that the exercise of its discretion will never render its decree a futile or an ineffective thing.[95] Nevertheless, actions for protection of political rights seem patently appropriate for equitable intervention. As for the technical right of action, a suit for equitable relief can be based directly on the Constitution.[96] Congress has provided an adequate statutory vehicle for invoking equity jurisdiction in the federal district courts. That statute authorizes civil actions, including "suits in equity" for deprivation of civil rights.[97] Jurisdiction of federal courts to entertain such matters is likewise specifically conferred by statute.[98]

X. Malapportionment and the Courts

The first case, *Wood v. Broom*,[99] which involved an attempt to have a state Congressional redistricting statute declared void because of its malapportionment held only that since the requirements of compactness, contiguity, and equality in population as found in the 1911 apportionment act were omitted in the 1929 apportionment act, they expired by their own limitation and fell with the apportionment to which they related.[100] The Court said that since these requirements were no longer in effect, it was unnecessary to consider the questions of right to relief in equity or as to the justiciability of the controversy. They therefore expressed no opinion on these points.[101]

The cases of *Smiley v. Holm*,[102] *Koenig v. Flynn*,[103] and *Carroll v.*

La. L. Rev. 593, 605-06 (1957).

[93]Cases cited note 56 *supra*.

[94]MacDougall v. Green, 335 U.S. 281, 290 (1948) (dissenting opinion).

[95]*Ibid.*

[96]*E.g.*, *Ex Parte* Young, 209 U.S. 123 (1908); see Hart & Wechsler, The Federal Courts and the Federal System 818 (1953).

[97]17 Stat. 13 (1871), 42 U.S.C. § 1983 (1958).

[98]28 U.S.C. § 1343 (3) (1958).

[99]287 U.S. 1 (1932).

[100]*Id.* at 6-8.

[101]*Id.* at 8.

[102]285 U.S. 355 (1932).

[103]285 U.S. 375 (1932).

Becker[104] confronted the Court with issues which concerned the realignment of congressional districts under the interpretation of state laws. The Court's hearing and deciding these cases established once and for all the justiciability of the issues which arose from the delineation of congressional districts within the states, but no questions of malapportionment were present in these cases.

The issues arising from the problem of malapportionment of congressional districts squarely confronted the United States Supreme Court in the case of *Colegrove v. Green*,[105] which had arisen in the State of Illinois. The three petitioners were qualified to vote in the more populous congressional districts of that state. They brought the suit to restrain state officers from arranging and directing the next congressional elections on the grounds that the congressional districts lacked compactness of territory and approximate equality of population. Three of the justices thought that there was no private wrong but merely a "wrong suffered by Illinois as a polity,"[106] and that it was hostile to a democratic system to involve the judiciary in the politics of the people. Most significantly of all, these three justices felt that the Constitution had conferred upon Congress exclusive authority to secure fair representation of the states in the House. If Congress failed to exercise its powers, the ultimate remedy lay only with the people.[107] The judiciary was excluded from what was essentially a political question because the issue had been committed to the exclusive control of Congress.[108] A fourth justice concurred in the result reached because he thought that as a matter of discretion the Court should not grant relief; but he did agree with the dissenting opinion that the issue of malapportionment was justiciable.[109]

Three justices dissented because: (1) the complaint presented a justiciable case and controversy; (2) the appellants had been injured as individuals; (3) the 1901 Illinois Districting Act worked a denial of the equal protection of the laws guaranteed by the fourteenth amendment; and (4) the act was a violation of the privileges and immunities clause in abridging appellants' privilege as citizens to vote for congressmen under article I, section two of the Constitution.[110] They also thought that the case of *Wood v. Broom* was not determinative of the constitutional issues.[111]

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[104]285 U.S. 380 (1932).

[105]328 U.S. 549 (1946).

[106]Colegrove v. Green, 328 U.S. 549, 552 (1946) (opinion of Frankfurter, J.).

[107]*Id.* at 554.

[108]*Id.* at 556.

[109]*Id.* at 564-66 (separate opinion).

[110]*Id.* at 566-74 (dissenting opinion).

[111]*Id.* at 573.

In the case of *Colegrove v. Barrett*[112] the petitioner sought to enjoin all future congressional elections in Illinois under the 1901 act. The Court dismissed the appeal for want of a substantial federal question. Three justices who dissented were of the opinion that probable jurisdiction should have been noted. The Supreme Court consistently employed the *Colegrove v. Green* rationale to deny challenges to the malapportionment of congressional and other political districts until quite recently.[113]

In the case of *Wesberry v. Sanders*[114] the appellants asked that the 1931 Georgia apportionment statute be declared invalid and that the governor and secretary of state be enjoined from conducting elections under it. They alleged that they were deprived of the full benefit of their right to vote in violation of (1) article I, section two of the Constitution; (2) the due process, equal protection, and the privileges and immunities clauses of the fourteenth amendment; and (3) that part of section two of the fourteenth amendment which provides that "Representatives shall be apportioned among the several States according to their respective numbers . . . ."

The majority opinion held that this suit concerning congressional apportionment presented justiciable controversy and that the command of article I, section two that representatives be chosen "by the people of the several states" means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.[115] It was the opinion of the majority that population was to be the basis of the House of Representatives. They specifically pointed out, however, that they did not reach the arguments that the Georgia statute violated the due process, the equal protection, and the privileges and immunities clauses of the fourteenth amendment.[116] They concluded that while it may be possible only to approximate equality of apportionment, there was still no excuse for ignoring the "Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives."[117] The majority held that the State of Georgia had abridged the right to vote for members of Congress guaranteed by the Constitution.

Mr. Justice Clark concurred in part and dissented in part. He agreed with the dissent that both the historical background and language preclude the holding that article I, section two lays down

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[112]330 U.S. 804 (1947) (memorandum decision).

[113]See Hartsfield v. Sloan, 357 U.S. 916 (1958); Kidd v. McCanless 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Remmey v. Smith, 342 U.S. 916 (1952); South v. Peters, 339 U.S. 276 (1950); Cook v. Fortson, 329 U.S. 675 (1946).

[114]84 Sup. Ct. 526 (1964).

[115]*Id.* at 530.

[116]*Id.* at 530 n.10.

[117]*Id.* at 535.

the *ipse dixit* "one person, one vote" in congressional elections; but he agreed with the majority that congressional districting is subject to judicial scrutiny. His view was that the trial court's judgment, which dismissed the case for want of equity, should be vacated and the case remanded for a hearing on the merits.[118] He offered the additional caveat that since the Georgia General Assembly was then in session, coercive relief should be deferred until after that body had had an opportunity to realign the congressional districts.[119]

Mr. Justice Harlan vigorously dissented on the grounds that the language of article I, sections two and four, the surrounding text, and the relevant history contradicted the majority opinion; that there was no existing legislation which required equality of population in each district; that because the Court substitutes its own judgment for that of Congress the majority opinion transgresses the political doctrine of the separation of powers.[120] In his opinion this decision must encourage "popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened."[121]

XI. The Judicial Remedy

In the *Wesberry* case the Court specifically left the question of relief to the district court for further consideration and decision in the light of the existing circumstances.[122] That question was rendered moot four days after the decision was handed down when the Georgia General Assembly split the overly populous Fifth District in two and realigned the rest of the state's congressional districts. Now Georgia's ten congressional districts range in population from 329,738 to 455,575.[123] In the future the courts may be compelled to grant affirmative relief in future cases involving the question of congressional apportionment. The problem of what relief to grant is the most challenging of all in this area of congressional apportionment.

First of all, no court can affirmatively remap the congressional districts by its own action. The act of creating and apportioning districts is given by the Constitution to the states, subject to the general control of Congress. Were the Court to reapportion and realign by its own act these congressional districts, it would manifestly usurp a function given by the Constitution to another branch of the government.[124] The Su-

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[118]*Id.* at 535-36.
[119]*Id.* at 536.
[120]*Id.* at 536-51.
[121]*Id.* at 551.
[122]*Id.* at 528.
[123]Time, Feb. 28, 1964, p. 20.
[124]See Comment, *Reapportionment: Is It Really a Political Question?*, 17 La. L. Rev. 593, 614 (1957).

preme Court of the United States would be indeed reluctant to issue a mandamus against all the members of the Senate or of the House of Representatives.[125] That action would terminate in a direct, no-holds-barred clash between the judicial and legislative branches of the federal government. Such a show-down would be reminiscent of President Jackson's comment about one of the Court's decisions of which he did not approve, "John Marshall has made his decision; now let him enforce it."[126]

The courts do possess the remedy of declaring an apportionment act under which the representatives are elected to be unconstitutional and void. The effect of this action would be to compel the states to hold their future elections at large until such time as their legislatures or other agencies reapportioned their districts in accordance with the courts' standard of "one man, one vote."[127] As in the school segregation cases the court would leave the offending party the responsibility of devising a plan which would conform with this standard.[128] Otherwise, in an election held at large, each vote would count with perfect equality; but such an election would turn the balance of power heavily in favor of urban interests.[129] It would seem that the burden of having to conduct state-wide campaigns would be sufficiently great to move the state rapidly to devise a more equitable plan for reapportionment in its congressional districts.[130] It was most definitely the result in the State of Georgia after the decision was handed down in the *Wesberry* case.[131]

This affirmative remedy of requiring the state to elect its entire congressional delegation at large has been granted twice by the United States Supreme Court in the cases of *Smiley v. Holm*[132] and *Carroll v. Becker*[133] and once in the case of *Brown v. Saunders*, a decision rendered by the Virginia Supreme Court.[134] The Virginia case, in which the congressional districts under a 1932 act ranged in population from 336,654 to 183,934, involved an express constitutional limitation on the

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[125]Comment, *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1018 (1929); see Comment, *Reapportionment: Is It Really a Political Question?*, 17 LA. L. REV. 593, 614 (1957).

[126]1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1937).

[127]Taylor, *Legal Action to Enjoin Legislative Malapportionment: The Political Question Doctrine*, 34 SO. CAL. L. REV. 179, 186 (1961).

[128]*Id.* at 186-87.

[129]*Id.* at 187.

[130]Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1087 (1958).

[131]See note 123 *supra*.

[132]285 U.S. 355 (1932).

[133]285 U.S. 380 (1932).

[134]159 Va. 28, 166 S.E. 105 (1932).

state legislature. In that case the court held that whether the state constitutional provision had been violated presented a question for judicial determination, and that there had been no bona fide attempt to make the districts even approximately equal in population. The court declared the apportionment act to be void.

In these three cases each state elected its representatives at large at the next election, and the House seated each delegation without any recorded objection.[135] In each of these cases the state legislatures redistricted and reapportioned their congressional seats before the next election.[136] It should also be noted that only one year after the *Colegrove* decision the state legislature revised the Illinois congressional districts for the first time in forty years.[137] A caveat must be attached to the remedy of requiring states to elect their entire congressional delegations at large by declaring its apportionment act unconstitutional. The congressional delegation which is in office at the time the court holds the state's apportionment act to be void must be recognized as a *de facto* body; or else the state will find itself with no representation whatever in Congress immediately upon the court's handing down its decision.[138]

XII. A Standard for Constitutional Apportionment

Because the courts presently possess an adequate remedy of a desirably temporary nature, they ought also to devise and perfect fairly specific criteria for determining whether a state's congressional districts are malapportioned in the light of the Constitution. That instrument requires only that equality of representation of congressional districts which an ordinary knowledge of its population and the dictates of reason and ordinary justice would support. Daniel Webster recognized that as between the states "absolute relative equality" of the apportionment of congressional members was an impossibility. But he did contend that the apportionment of representatives among the several states was to be made "according to their respective numbers, as near as may be."[139] He said, "That which cannot be done perfectly must be done in a manner as near perfection as can be . . . . In such a case approximation becomes a rule."[140] It is submitted that Webster's ideas about the relative equality of apportionment between the states is equally applicable to the apportionment of population among the congressional districts within the same state.

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[135]Lewis, *supra* note 130, at 1088 & n.177.

[136]Lewis, *supra* note 130, at 1088 & n.178.

[137]*Id.* at 1088.

[138]See Tabor, *The Gerrymandering of State and Federal Legislative Districts,* 16 Md. L. Rev. 277, 287 (1956).

[139]1 Story, The Constitution 504 (5th ed. 1891).

[140]*Ibid.*

Aside from the problem of equality in population, congressional districting is an extraordinarily complex subject. Among the many other relevant considerations are: (1) geography; (2) electoral convenience; (3) demography; (4) communications; (5) economic and social cohesions or diversions among local groups; (6) ancient traditions and ties of settled usage; (7) the practical effects of political institutions like the lobby and the city machine; (8) respect for proven incumbents of long experience and senior status; and (9) a census which compiles relevant data other than mere population figures.[141] But above all else, it is submitted that the Constitution requires that there be reasonable equality of population among the congressional districts.[142] Approximation must be the rule, true; but a definite standard is a prerequisite for meaningful approximation. While exact numerical equality of every congressional district is obviously impossible, the subject is susceptible to mathematical criteria, which can provide that definite standard.[143]

It has been proposed that a definite but arbitrary standard of populational variance between the largest and the smallest congressional district be adopted by the Congress or the state legislatures. For example either might by statute require that a state's most populous district be no more than fifty percent larger than the least populous district.[144] Even this standard of variance would have been exceeded by at least thirty states in 1958.[145] Such a standard would be of some use and benefit; but where it is possible to reduce this percentage of variance, the apportioning body or agency ought to be deemed to be under a constitutionally imposed duty to reduce that variance as much as the facts of population distribution and other relevant circumstances will permit.

XIII. Conclusion

The legislative branch of the government, both state and federal, are best suited to solve satisfactorily the problem of malapportionment of congressional districts within the state. The state legislatures seem to act only when the respective state either gains or looses a representative, and even then the fruits of their efforts are seldom fair. Congress once attempted to regulate the states in delineating congressional districts, but its last effort in this direction occurred more than forty years ago.

The federal courts have firmly established the precedent that the United States Constitution protects a citizen's right to cast his vote and to have it counted accurately once he has acquired that right under

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[141]Baker v. Carr, 369 U.S. 186, 323 (1962) (dissenting opinion).

[142]Wesberry v. Sanders, 84 Sup. Ct. 526 (1964).

[143]56 Yale L.J. 127, 138 (1946).

[144]Lewis, *supra* note 130, at 1062.

[145]*Ibid.*

the state law. The obvious effect of the malapportionment of congressional districts is to alter and to dilute the value of one man's vote solely because of where he happens to reside in that state. The legislative branch, especially the House of Representatives, has done nothing to protect this constitutional right. By declaring an apportionment act which results in malapportionment unconstitutional and void, the courts can effectively restore the democratic process in our government. There is nothing unconstitutional about requiring a state to elect its Congressmen at large on a general ticket. In the past when it was confronted with having to elect its representatives in this manner, the state invariably reapportioned and realigned its congressional districts more fairly and equitably.

The people must serve as the ultimate guardians of their liberties, and they should emphatically carry the burden of insuring that the legislative branch maintains constitutional apportionment of congressional districts. But past experience has repeatedly demonstrated that malapportionment preserves itself so that the people are powerless to eliminate it by the usual political processes. Under such circumstances the courts can effectively restore the democratic process by an adequate relief which is temporary in nature.

H. L. Mencken once wrote that the old apportionments couldn't last; that they were unjust and undemocratic.[146] The courts can assist in transforming his prediction into a reality if they will but exercise their constitutional powers.

Thomas Allen Coleman

[146]MENCKEN, A CARNIVAL OF BUNCOMBE 160 (Moos ed. 1956) [reprinted from the Baltimore Evening Sun, July 23, 1928, p. 15, col. 4 (financial ed.)].

SELLING THE BLUE SKY IN MISSISSIPPI—A COMPARISON OF THE MISSISSIPPI SECURITIES ACT WITH THE UNIFORM SECURITIES ACT

I. Introduction

In 1958, the Legislature of Mississippi adopted the Mississippi Securities Act.[1] As of this writing, no case has yet reached the Mississippi Supreme Court on this new blue sky law, but this is not at all surprising since the field of security regulation does not lend itself to judicial review.[2] Several reasons may be given for this phenomenon, but perhaps the most convincing is that issuers of securities usually operate on a close time schedule. As a result, the registrant under a blue sky law will usually acquiesce in the demands of a blue sky administrator, or withdraw the registration application.[3] Thus this comment cannot be an exposition of the case law built up under the Mississippi Securities Act. It is, however, believed that a critique of the Mississippi blue sky law is needed. Not having any case law built up around the act, it is hoped that a comparison of the Mississippi Act with the Uniform Securities Act[4] will be fruitful.

The Uniform Act was approved August 25, 1956, by the National Conference of Commissioners on Uniform State Laws,[5] and has been adopted—in whole or part—in eighteen jurisdictions.[6] According to one of the authors of the Uniform Act, Professor Louis Loss, writing in 1958, Mississippi was one of only three jurisdictions, substantially revising their blue sky laws after the promulgation of the Uniform Act, which did not borrow heavily from the Uniform Act.[7]

As Mississippi moves forward toward its fourth decade of industrial development, the need for laws which will not hinder the growth of business nor hamper the generation of capital becomes increasingly acute. Balanced against this need is the necessity of protecting the public from purchasing worthless securities. It is with these two problems in mind that the following comparison has been undertaken.

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[1]Miss. Code Ann. §§ 5360-5390 (Supp. 1962).

[2]See Loss & Cowett, Blue Sky Law 63-64, 80-81 (1958) [hereinafter cited as Loss & Cowett].

[3]Loss & Cowett 64.

[4]Uniform Securities Act, 9C Uniform Laws Ann. 84; reprinted in Loss & Cowett 249-411.

[5]9C Uniform Laws Ann. 84.

[6]Alabama, 1959; Alaska, 1959; Arkansas, 1961; Colorado, 1961; Hawaii, 1957; Indiana, 1961; Kansas, 1957; Kentucky, 1960; Maryland, 1961; Montana, 1961; Nevada, 1963; New Jersey, 1960; Oklahoma, 1959; Puerto Rico, 1963; South Carolina, 1961; Utah, 1963; Virginia, 1956; Washington, 1959.

[7]Loss, *The Uniform Securities Act and the Bar*, 13 Bus. Law 609 (1957).

It is not within the scope of this paper to attempt a line by line analysis and critique of both acts. Rather, a general comparison of some of the key sections which parallel each other will be made.

II. General Background

P. T. Barnum said, "There's a sucker born every minute." While there is no equally eminent authority to the effect that rascals are born with the same frequency, history certainly will verify that quite a number have been produced. There seems to be quite an affinity between the rascal and the securities business. Though many examples could be given, no more than two famous scandals in which securities were used to part the sucker from his purse need be named—the Mississippi Bubble and the South Sea Bubble. The list could be extended indefinitely—from phantom gold mines to imaginary uranium mines—but no useful purpose can be served by a detailed catalogue of financial ventures in which the quest for El Dorado has led men to invest in a will-o'-the-wisp.

Though the movement for regulation of securities probably has ancient roots,[8] the British Companies Act of 1848[9] introduced the requirements of prospectus and disclosure as we know them today. The underlying philosophy of the Companies Act is that full and complete disclosure of all relevant information pertaining to the worth of the offered securities must be had.[10] This same philosophy of disclosure generally pervades the federal enactments in the securities field, beginning with the Securities Act of 1933.[11] The federal government, however, did not enter the field of securities regulation until relatively late in the game.

State regulations of securities is considerably older than federal regulation. The roots may be traced back as far as 1852 in Massachusetts,[12] but Kansas is usually given credit for enacting the ancestor of

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[8]See generally Loss, Securities Regulation 3-22 (2nd ed. 1961) [hereinafter cited as Loss].

[9]*Id.* at 5.

[10]See 1 Loss 5-6.

[11]48 Stat. 74 (1933), 15 U.S.C. §§ 77(a)-77(aa) (1958). Other Federal enactments subsequent to the Securities Act of 1933 are: Securities Exchange Act of 1934, Public Utilities Holding Company Act of 1935, Chapter X of the Bankruptcy Act, Trust Indenture Act of 1939, Investment Company Act of 1940, Investment Advisors Act of 1940. It should be noted that some of the acts subsequent to the Securities Act are much closer in philosophy to the usual Blue Sky Laws in that they depart from the requirement of mere disclosure in favor of a more paternalistic approach reminiscent of the state regulation of securities. A discussion of the various Federal laws on securities regulations is well beyond the scope of this comment. For such a discussion see Loss.

[12]Loss & Cowett 3; 1 Loss 23.

the modern blue sky laws.[13] At the present time, forty-eight states have some form of a more or less comprehensive regulatory system governing the issuance and sale of securities.[14] These several acts, though varying infinitely in detail, fall into one, or a combination, of three broad categories: (1) Anti-fraud statutes; (2) Statutes requiring registration of brokers, dealers, etc.; and (3) Statutes requiring registration of securities. Both the Mississippi and Uniform Acts incorporate all three approaches.

III. Definitions

In comparing statutes, it is well to know precisely what is included within the purview of the statute by definition. Therefore a comparison of the two acts must begin with the sections defining terms.

A. Securities

Both acts define "securities"[15] to include all the commonly accepted forms of securities—stocks, bonds, treasury stock, debentures, etc.—and both include certificates "of interest in an oil, gas, or mining title or lease." Both also include an elastic clause to the effect that any interest or certificate commonly known as a security is included within the definition. The Uniform Act enumerates such things as "preorganization certificate or subscription; . . . or any certificate of interest or participation in [a] warrant or right to subscribe to or purchase, any of the foregoing. . . ." These would probably be caught by the elastic clause in the Mississippi Act. The Uniform Act specifically excludes annuities, or insurance or endowment policies under which the insurer "promises to pay a fixed number of dollars either in a lump sum or periodically for life or some other specified period." The Mississippi Act exempts these items in another section.[16] All in all, both definitions are probably limited, in their scope, only by imagination; both probably can encompass any form of security that could be devised by the mind of man.

B. Issuer

The Uniform Act speaks in terms of "issuer,"[17] while the Mississippi Act uses the terms "domestic investment company,"[18] "foreign investment

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[13]Loss & Cowett 7; 1 Loss 27.

[14]1 Loss 30. The only states without Blue Sky Laws are Nevada and Delaware.

[15]Miss. Code Ann. § 5361(c) (Supp. 1962); Uniform Securities Act § 401(1).

[16]Miss. Code Ann. § 5384(A)(4) (Supp. 1962). By excluding such items from the definition of "securities," the anti-fraud provisions of the act are inapplicable to them, whereas the anti-fraud provisions are applicable if only an exemption is made.

[17]Uniform Securities Act § 401(g).

[18]Miss. Code Ann. § 5361(a) (Supp. 1962).

company,"[19] and "issuer."[20] For the purposes of this comment all of the above mentioned terms may be treated as synonymous. Generally, under both acts, an issuer is any person who issues or *is about to issue* securities. "Person" is defined by both acts[21] to include corporations, partnerships, associations, trust companies, and the like. The Uniform Act provides certain specific applications of the term "issuer" for peculiar situations which are beyond the scope of this paper.

C. Dealer

The Mississippi Act[22] uses the term "dealer" while the Uniform Act employs the term "broker-dealer."[23] Generally speaking, both terms include persons who handle transactions in securities for others or for their own account. A "dealer" or a "broker-dealer" cannot be an issuer. There are nuances in the definitions of both acts which need not be considered here.

D. Other Definitions

There are numerous other terms defined in either one or both of the acts, but the technical meanings ascribed to such words as "sale," "offer," "agent" and the like need not be considered in a paper of this scope. For the purposes of this paper, such words are considered to have their normally accepted legal meanings since the technical meanings which they acquire in the securities field are inconsequential in all but a few instances.

IV. Anti-Fraud Provisions

The most simple form of blue sky law—either standing alone or in conjunction with one or both of the other types—is the anti-fraud provision. Forty out of forty-eight blue sky laws contain some sort of prohibition against fraudulent practices in the securities business.[24] Prior to the 1958 act, Mississippi was one of the few states that did not have a general anti-fraud provision in its blue sky law, but with the adoption of the new act in 1958, Mississippi joined the ranks of anti-fraud states.[25]

The Mississippi statute defines fraudulent practices in broad terms to include: (1) Knowingly making any false statements or representations

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[19]Miss. Code Ann. § 5361(b) (Supp. 1962).

[20]Miss. Code Ann. § 5361(h) (Supp. 1962).

[21]Miss. Code Ann. § 5361(g) (Supp. 1962); Uniform Securities Act § 401(i).

[22]Miss. Code Ann. § 5361(d) (Supp. 1962).

[23]Uniform Securities Act § 401(c).

[24]See 1 Loss 42 (Supp. 1962).

[25]Miss. Code Ann. § 5380 (Supp. 1962).

in any of the documents required to be filed under the act;[26] (2) Employing, directly or indirectly, "any device, scheme or artifice to defraud," or engaging in any acts or practices which would operate to defraud or deceive the "purchaser, seller, or investor."[27]

The Uniform Act employs similar, but more simple, language to say substantially the same thing.[28] There are no exemptions from the anti-fraud provisions of either act[29] and they operate without dependence on any other provisions of the act.

The Mississippi Act contains a specific prohibition against fraud on the part of purchasers of securities. The Uniform Act would impliedly include this type of fraud also.[30] It is important to note that the anti-fraud provisions are drafted so that the unwary seller as well as the careless purchaser receives protection.

Under the Mississippi Act persons who have been defrauded may sue to recover the amount paid[31] or, in the case of a purchaser injured by a violation of the act, may elect to void the sale, by tendering the securities, and everything received pursuant to them, back to the seller.[32] There seems to be no good reason why the election to void the sale should be limited to purchasers, especially in light of the specific provisions in the Mississippi Act prohibiting fraud upon sellers. Perhaps this anomaly was merely an oversight and will be corrected by the legislature.

In addition to the personal remedies provided an individual injured by a violation of the blue sky law, the Secretary of State is empowered to halt violations in several ways. The secretary may:

(1) Issue an order prohibiting the person violating the act from continuing the violation;[33]

(2) Apply for an injunction ordering the cessation of the violation;[34] or

(3) Transmit information and evidence to the Attorney General for the purpose of bringing a criminal action under the act.[35]

The use of the three remedies above is not limited to the stopping of violations which are taking place, but may also be used to prevent potential violations.

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[26]Miss. Code Ann. § 5380(a) (Supp. 1962).

[27]Miss. Code Ann. § 5380(b) (Supp. 1962).

[28]Uniform Securities Act § 101.

[29]Miss. Code Ann. § 5380(b) (Supp. 1962); Loss & Cowett 251.

[30]See Loss & Cowett 251-52.

[31]Miss. Code Ann. § 5371 (Supp. 1962).

[32]Miss. Code Ann. § 5374 (Supp. 1962).

[33]Miss. Code Ann. § 5381(1) (Supp. 1962).

[34]Miss. Code Ann. § 5381(2) (Supp. 1962).

[35]Miss. Code Ann. § 5381(3) (Supp. 1962). Miss. Code Ann. § 5385 provides that wilful violations of the act shall be felonies and carry penalties of a fine up to $10,000 or imprisonment for not more than five years, or both.

The Uniform Act imposes civil liability on any person who violates the act; any person injured by a violation may recover damages.[36] There are many differences in the civil liabilities section of the two acts under consideration, but little purpose would be served by a detailed account of the variations. The end result under either, it seems, would be similar, though procedure and technicalities might differ. The Uniform Act, however, has no provision allowing an injured purchaser to void the sale of a security made in violation of the act.[37]

Probably recovering damages is a sufficient remedy, and no real need exists for the provision allowing the purchaser to void a sale. The draftsmen of the Uniform Act indicate that such a provision was deliberately omitted because of the difficulty in searching the statutes to determine if a violation has actually occurred, and because the remedy might prove too drastic for the mere technical breach of a minor provision of the act.[38] The criticism seems to be a valid one.

The Uniform Act has provisions allowing injunctions[39] and the initiation of criminal proceedings[40] which differ only in detail from the parallel provisions in the Mississippi Act. However, the Uniform Act does not provde for the issuance of an administrative order to halt actions which are in violation of it.[41] Though the use of injunctions would probably fill this gap in the Uniform Act, it would seem that an administrative "stop order" would be an effective tool to have just in case its exercise was necessary. Of course, any such administrative order would be issued subject to a hearing.[42]

Thus we have seen that there is a substantial amount of overlap between the two acts in the anti-fraud provisions and the remedial provisions. Each, however, is both broader and narrower than the other to some degree.

The Uniform Act, however, goes considerably farther than Mississippi's act by regulating the activities of investment advisers.[43] Fraudulent practices on the part of investment advisors are prohibited,[44] as well as certain other activities. Mississippi would do well to adopt this provision of the Uniform Act for it would subject investment advisers to the civil liabilities, and other penalties, imposed by the blue sky law

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[36]UNIFORM SECURITIES ACT § 410.

[37]See LOSS & COWETT 390 [Draftsmen's Commentary to § 410(a)].

[38]*Ibid.*

[39]UNIFORM SECURITIES ACT § 408.

[40]UNIFORM SECURITIES ACT § 409.

[41]See LOSS & COWETT 387 [Draftsmen's Commentary to § 408]; see also note 33 *supra* and accompanying text.

[42]MISS. CODE ANN. § 5381 (Supp. 1962); see MISS. CODE ANN. § 5369 (Supp. 1962).

[43]UNIFORM SECURITIES ACT § 102.

[44]UNIFORM SECURITIES ACT § 102(a).

for misfeasance, and allow some regulation of such persons not otherwise provided for in the act; thus adding substantially to the protection afforded the public by the Securities Act.

V. Registration of Dealers and Assorted Others

Forty-seven out of the forty-eight blue sky jurisdictions have some sort of requirement that "dealers" or "broker-dealers" be registered in order to deal in securities.[45] The requirements vary substantially both as to procedure and as to coverage.[46] Notwithstanding these variations, the basic purpose of requiring registration of dealers is "to prevent fraudulent or unqualified persons from entering the securities business, to supervise their activities within the state once registration has been achieved, and to remove them from registration if they fall below any of the statutory grounds."[47]

Under both acts, it is unlawful to deal in securities without a dealer's registration certificate.[48] Agents of dealers and issuers, too, must be registered.[49] The Uniform Act requires that investment advisers[50] be registered in addition to dealers and their agents. This provision is of course consonant with the sections of the Uniform Act discussed previously which impose civil liability upon investment advisers who engage in fraudulent practices, and is in line with what seems to be the Uniform Act's policy of providing regulatory controls over the securities business in its entirety.

Generally speaking, the registration process is relatively similar under both acts. An applicant must file papers giving his name, place of organization, some history of his business, and a general description of the securities in which he plans to deal, plus whatever else may be required by administrative rule.[51] Under the Mississippi Act, if the submitted information proves "satisfactory" to the Secretary of State, the permit applied for "may" be issued.[52] Under the Uniform Act, the registration becomes effective automatically thirty days after it is filed if it is not denied or no denial proceeding is pending.[53]

It would seem that the Mississippi Act leaves something to be desired in that it provides no clear standards for the denial of an application other than the information must be "satisfactory" to the

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[45]See 1 Loss 43. The single exception is Wyoming.

[46]*Ibid.*

[47]Loss & Cowett 19.

[48]Miss. Code Ann. § 5375 (Supp. 1962); Uniform Securities Act § 201(a).

[49]Miss. Code Ann. § 5372 (Supp. 1962).

[50]Miss. Code Ann. § 5372 (Supp. 1962); Uniform Securities Act § 201(c).

[51]Miss. Code Ann. § 5372 (Supp. 1962); Uniform Securities Act § 202(a).

[52]Miss. Code Ann. § 5372 (Supp. 1962).

[53]Uniform Securities Act § 202. For grounds for denial and procedure see Uniform Securities Act § 204.

Secretary of State. The Uniform Act, on the other hand, provides extensive treatment of the grounds on which registration may be denied, revoked, suspended, or cancelled.[54] The Mississippi Act does specify grounds on which registration may be suspended or revoked.[55] Probably the grounds given for suspension or revocation of registration would be used to deny registration in the first place, but this needs to be clearly set out in the act.

The Uniform Act provides that registration of dealers must be renewed every year.[56] No such comparable provision is found in the Mississippi Act. Apparently dealer registration in Mississippi is permanent until the Secretary of State revokes the registration by affirmative act.[57] It would seem that the Uniform Act's provision is preferable because it provides for keeping closer check on dealers than the Mississippi Act, and thus a more thorough policing of the securities business is effected. It would seem, however, that the Mississippi Act gives the Secretary of State sufficient authority to provide, by administrative rule, for the periodic filing of information upon which the dealer's registration might be reviewed.[58]

VI. Registration of Securities

All but two blue sky laws require the registration of securities as a condition precedent to their sale.[59] Registration may take numerous forms but only three will be discussed here: Qualification, Notification, and Coordination. Both the Mississippi[60] and Uniform[61] Acts require that securities be registered before they may be legally sold.

A. Registration by Qualification

The Mississippi Act requires that the issuer of securities must register the securities with the Secretary of State.[62] This registration is effected by the issuer's filing the plan by which the securities are to be sold, the prospectus, any advertising literature to be used in selling the issue, an itemized statement of assets and liabilities and its financial condition, and various other items which are required by statute,[63] or may be required by the Secretary of State.[64] There are numerous other

[54]Uniform Securities Act § 204(a).
[55]Miss. Code Ann. § 5368 (Supp. 1962).
[56]Uniform Securities Act § 201(d).
[57]*Cf.* Miss. Code Ann. § 5372; Miss. Code Ann. § 5368 (Supp. 1962).
[58]See Miss. Code Ann. § 5368(a) (Supp. 1962).
[59]See 1 Loss 49 (Supp. 1962). The exceptions are Maryland and New Jersey.
[60]Miss. Code Ann. § 5362 (Supp. 1962).
[61]Uniform Securities Act § 301.
[62]Miss. Code Ann. § 5362 (Supp. 1962).
[63]*Ibid.*
[64]Miss. Code Ann. § 5364 (Supp. 1962).

technical provisions with which the issuer must comply.[65] If, upon conducting a full examination of all the information filed, and of any persons who may be interested, the secretary finds that:

(1) The sale of the securities would not defraud or deceive the purchasers;
(2) Securities to be issued in exchange for property or services do not exceed the reasonable value of the property or services;
(3) The issuers or guarantors of the securities are not financially unstable; and
(4) The sale or issuance of the securities is not a mere scheme to foist worthless paper off onto an unsuspecting public

then he shall approve the sale and issue a permit to the applicants.[66]

Although the filings required and the mechanics of the Uniform Act vary in detail from the brief survey of the Mississippi procedure for registration of securities above, the pattern is in general similar.[67] The Uniform Act, like the Mississippi act, requires affirmative action on the part of the administrator before the registration may become effective,[68] but "the absence of automatic effectiveness in qualification cases is the standard pattern today."[69]

As can be seen from the foregoing, the registration of securities by qualification essentially provides for the administrator of the blue sky law to pass upon the merits of the issue before it can even be sold. This is probably a satisfactory procedure for small intra-state issues, or promotional issues, or issues exempted from federal regulation. But it would seem that such a process would unduly burden the issuance of securities by well established issuers, or an issue which falls within the jurisdiction of the Securities Exchange Commission or some other federal regulatory agency.[70] To accommodate the cases in which any risk to the public due to the quality of the securities to be issued is minimal, the Uniform Act has provided alternative methods of registration.

B. Registration by Notification

The Uniform Act[71] provides that certain securities may be registered by notification. An issuer may elect this form of registration if:

(1) The issuer (or its predecessors) has operated continuously for five years;

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[65]Miss. Code Ann. §§ 5363, 5365 (Supp. 1962).
[66]Miss. Code Ann. § 5366 (Supp. 1962).
[67]See Uniform Securities Act § 304(b).
[68]Uniform Securities Act § 304(c).
[69]Loss & Cowett 305 [Draftsmen's Commentary to § 304(c)].
[70]Loss & Cowett 299-300 [Draftsmen's Commentary to § 304(a)].
[71]Uniform Securities Act § 302.

(2) There has been no default by the issuer in the payment of interest, principal, or dividends on any security of the issuer which has a fixed interest or dividend rate, or a fixed date of maturity, within the current or the preceding three fiscal years; and

(3) During the preceding three fiscal years the average net earnings on the securities of the issuer which have no fixed interest, dividend, or maturity, equals five per cent of the purchase price (which is determined according to the act).[72]

There are certain other provisions that would have to be met under peculiar circumstances.[73]

To register by notification the issuer files certain documents[74] required by the act, and the registration becomes effective automatically two days later if no stop order proceeding is pending.[75]

C. Registration by Coordination

The Uniform Act provides for an even simpler form of securities registration—registration by coordination.[76] "Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination."[77]

To register by coordination, essentially all the issuer must file under the blue sky law is what he filed with the Securities Exchange Commission, plus a few other documents which the administrator of the act "may" request.[78] Subject to certain conditions, registration by coordination becomes effective under the blue sky law at the same time the registration statement before the Securities Exchange Commission becomes effective.[79] Obviously this provision greatly facilitates nationwide simultaneous issuance of securities.

D. Summary

In the Uniform Act the three types of securities registration are not intended to be mutually exclusive. Any security can be registered by qualification. Some can be registered under any of the three provisions. Perhaps the need for simplified registration procedures for certain issues can be pointed up by an illustration. Suppose General Motors

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[72]Uniform Securities Act § 302(a).

[73]*Ibid.*

[74]Uniform Securities Act § 302(b).

[75]Uniform Securities Act § 302(c).

[76]Uniform Securities Act § 303.

[77]Uniform Securities Act § 303(a).

[78]Uniform Securities Act § 303(b).

[79]Uniform Securities Act § 303(c).

decided to issue 1,000,000 shares of common stock to the public.[80] Obviously the issue would have to be registered with the Securities Exchange Commission under the Securities Act of 1933 and therefore could be registered by coordination under the Uniform Act. In all probability it meets the test for registration by notification. Why should General Motors go through the same procedures in several dozen states in order to sell its stock as the "Grey Ghost Uranium Mining Company" which was organized last week under the laws of the Fiji Islands? This admittedly extreme example should demonstrate that Mississippi would do well to adopt registration by coordination and registration by notification.

VII. Exemptions

The foregoing discussion has principally dealt with the effect of blue sky laws on the persons and securities within its ambit. Now that which has gone before must be modified by a brief commentary on those securities and transactions which are, by the terms of the act, exempted from its provisions. Only where some substantial difference exists between the two acts will the terms of both be contrasted. It should be noted that these exemptions apply only to the registration of dealers and registration of securities provisions—there are no exemptions from the anti-fraud provisions.

A. Exempt Securities

The two acts substantially are parallel in providing the following exempted securities:

(1) Securities issued or guaranteed by the United States, its territories, possessions, etc., or another state;[81]

(2) Securities of banks organized or supervised under the laws of the United States or any state;[82]

(3) Securities issued by a savings and loan association regulated by Mississippi. The Uniform Act is broader in that the exemption includes securities issued by Federal Savings and Loan Associations, and any other such association qualified to do business in the state of enactment.[83]

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[80]It must be noted that General Motors stock would probably be listed on a national stock exchange and therefore an exempted security; see note 92 *infra* and accompanying text.

[81]Miss. Code Ann. 5384(A) 1 (Supp. 1962); Uniform Securities Act § 402(a)(1).

[82]Miss. Code Ann. § 5384(A) 2 (Supp. 1962); Uniform Securities Act § 402(a)(3).

[83]Miss. Code Ann. § 5384(A) 3 (Supp. 1962); Uniform Securities Act § 402(a)(4).

(4) Securities issued by public utilities which are regulated by the United States or another state in their rates or issuance of securities;[84]

(5) Securities issued by non-profit charitable or service organizations;[85]

(6) Commercial paper;[86] and

(7) Securities issued by foreign governments, or subdivisions thereof, with which the United States maintains diplomatic relations.[87]

In addition to those listed above, there is a great deal of similarity in two other provisions which nevertheless merit some discussion. The Mississippi Act exempts insurance or endowment policies, or annuity contracts if they are issued under the regulations of the insurance commissioner, or similar official of any state.[88] The Uniform Act excludes insurance and endowment policies, and ordinary annuities from the *definition* of "securities,"[89] but specifically excludes variable annuities from the *exemption.*[90] The reason for this exclusion—given by the draftsmen—is that variable annuities are sufficiently like investment contracts that they should be subjected to the blue sky law.[91]

Both acts exempt securities which are listed on any national stock exchange. This exemption also includes securities equal or senior to the listed securities, which are not, however, listed.[92] The Mississippi Act, however, states that "the secretary of state may at any time by order rescind the exemption." This grant of power to the secretary of state—without any standard specified for its application—might well be in violation of the due process clause of the Constitution.[93]

Beside those parallel exemptions noted above, the Mississippi Act also exempts:

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[84]Miss. Code Ann. § 5384(A) 5 (Supp. 1962); Uniform Securities Act § 402(a)(7).

[85]Miss. Code Ann. § 5384(A) 6 (Supp. 1962); Uniform Securities Act § 402(a)(9).

[86]Miss. Code Ann. § 5384(A) 8 (Supp. 1962); Uniform Securities Act § 402(a)(10).

[87]Miss. Code Ann. § 5384(A) 9 (Supp. 1962); Uniform Securities Act § 402(a)(2).

[88]Miss. Code Ann. § 5384(A) 4 (Supp. 1962).

[89]Uniform Securities Act § 401(1).

[90]Uniform Securities Act § 402(a)(5).

[91]See Loss & Cowett 356-57 [Draftsmen's Commentary to § 402(a)(5)].

[92]Miss. Code Ann. § 5384(A)(7) (Supp. 1962); Uniform Securities Act § 402(a)(8).

[93]*Cf.* Cities Service Co. v. Koeneke, 137 Kan. 7, 20 P.2d 460 (1931).

(1) Secured notes if the note and security are sold together to a single customer or in a single sale;[94]
(2) Securities of cooperatives organized and operating wholly within Mississippi;[95] and
(3) Certain interests in oil, gas, and mineral leases.[96]

The Uniform Act, in addition, exempts:

(1) Securities issued or guaranteed by federal and certain other credit unions;[97] and
(2) Investment contracts issued pursuant to employees' benefit plans.[98]

B. Exempt Transactions

Both acts exempt generally the following transactions:

(1) Isolated sales not made by issuers;[99]
(2) Sales by executors, administrators, trustees, guardians, etc.;[100]
(3) Sales by pledgees if made in good faith and not for the purpose of evading the blue sky law;[101]
(4) Sales to limited numbers of persons for the purpose of investment, provided no commissions are paid;[102]
(5) Converting existing securities;[103]
(6) Sales by dealers of previously issued securities in the normal course of business, provided the securities sold are not part of a previously unsold allotment.[104]

The Mississippi Act exempts, in addition to those transactions listed above, the following:

(1) Stock dividends;[105]

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[94]Miss. Code Ann. § 5384(A)(10) (Supp. 1962); the Uniform Securities Act treats this as an exempt transaction, § 402(b)(5).

[95]Miss. Code Ann. § 5384(A)(11) (Supp. 1962).

[96]Miss. Code Ann. § 5384(A)(12) (Supp. 1962).

[97]Uniform Securities Act § 402(a)(6).

[98]Uniform Securities Act § 402(a)(11).

[99]Miss. Code Ann. § 5384(B)(3) (Supp. 1962); Uniform Securities Act § 402(b)(1).

[100]Miss. Code Ann. § 5384(B)(91) (Supp. 1962); Uniform Securities Act § 402(b)(6).

[101]Miss. Code Ann. § 5384(B)(2) (Supp. 1962); Uniform Securities Act § 402(b)(7).

[102]Under the Mississippi Act the total number of shareholders after the sale may not exceed twenty, nor may the total purchase sales price of the shares after the sale exceed $20,000. The Uniform Act permits an offering to no more than ten persons.

[103]Miss. Code Ann. § 5384(B)(8) (Supp. 1962); Uniform Securities Act § 402(b)(11).

[104]Miss. Code Ann. § 5384(B)(10) (Supp. 1962); Uniform Securities Act § 402(b)(2).

[105]Miss. Code Ann. § 5384(B)(4) (Supp. 1962).

(2) The exchange of securities of one corporation with another corporation, or its security holders, to acquire all or substantially all of the assets of the other corporation, or pursuant to consolidation or merger of two corporations;[106]
(3) Exchange of securities with existing securities holders;[107] and
(4) Sales to banks, or similar persons, the United States, or a state, or to persons whose business is buying securities.[108]

The Uniform Act contains the following exemptions not found in the Mississippi Act:

(1) Unsolicited brokerage transactions;[109]
(2) Transactions between issuer and underwriters or between underwriters;[110]
(3) Sales to institutional buyers;[111]
(4) Offers or sales of preorganizational certificates to a limited number of persons;[112] and
(5) Offers made prior to the effective date of a registration certificate when registration statements have been filed under the Securities Act of 1933 and under the blue sky law.[113]

The provisions of the Mississippi Act exempting certain transactions seem to be quite satisfactory as far as they go. Certainly it would seem that some additional exemptions are needed, particularly the exemption permitting transactions between underwriters which the Uniform Act provides. However, this exemption is often implied when it is not specifically set out.[114] In addition, the Uniform Act's exemption of offers made during the waiting period after registration has been filed but before it becomes effective, seems to reflect a realistic approach that the Mississippi Act could well emulate.

VIII. Conclusion

The Mississippi Securities Act is a very difficult act to master. Its organization and structure are beyond the ken of even a careful reader. Oftentimes one must search the entire act for a particular provision which will be found in a section with a label that is quite

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[106]Miss. Code Ann. § 5384(B)(5) (Supp. 1962).
[107]Miss. Code Ann. § 5384(B)(6) (Supp. 1962).
[108]Miss. Code Ann. § 5384(B)(7) (Supp. 1962). Compare Uniform Securities Act § 402(b)(8).
[109]Uniform Securities Act § 402(b)(3).
[110]Uniform Securities Act § 402(b)(4).
[111]Uniform Securities Act § 402(b)(8). Compare Miss. Code Ann. § 5384 (B)(7) (Supp. 1962).
[112]Uniform Securities Act § 402(b)(10).
[113]Uniform Securities Act § 402(b)(12).
[114]Loss & Cowett 365 [Draftsmen's Commentary to § 402(b)(4)].

misleading as to the actual content of the section. The Uniform Act, on the other hand, is much easier to use since its draftsmen have grouped all related sections together. However, it is not the purpose of this comment to criticize draftsmanship.

If it could be considered in a vacuum, the Mississippi Act is substantially satisfactory. Enough protection is furnished the public and the burden on business of complying with its terms is not insurmountable. It is, however, impossible to consider any state's blue sky law alone; always we must remember the existence of numerous federal statutes regulating securities plus forty-seven other blue sky laws. The world of business finance respects no state boundaries, therefore if the public can be protected—from itself as well as the rascals who traffic in worthless securities—by a simple and uniform act with essentially the same effectiveness as a complex act, why should not the simple act be chosen? Eminent authorities have stated the problem thusly:

> It would be difficult to think of any area of the law where there is as much pointless complexity and where at the same time uniformity is so essential. Even in the general area covered by such ancient and honorable statutes as the Negotiable Instruments Law and the Uniform Sales Act, interstate business did not have to conjure with the problems of concurrently satisfying several dozen *regulatory authorities,* not to mention a federal agency engaged in administering and developing a closely related body of federal law.[115]

As has been pointed out in the preceding pages the substantive variations between the Mississippi Securities Act and the Uniform Securities Act are relatively minor in most instances. There is a great host of technical differences, and it is these differences which, in the main, would be overcome by the adoption of the Uniform Act. It would certainly be in line with the Mississippi policy in evidence for the last thirty to forty years, of passing legislation that does not overly hamper further industrialization. It is submitted that the adoption of the Uniform Securities Act would not be detrimental to the public interest, and would be in the interest of Mississippi's expanding economy.

Richard Baxter Wilson, Jr.

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[115]Loss & Cowett 230.

OPEN MINE DOCTRINE IN MISSISSIPPI

I. Introduction

Even though Mississippi is now in its third decade of oil and gas production it has yet to encounter some of the difficult future interest problems that have arisen in other oil and gas states. One of these problems encountered in the older oil and gas producing states such as Texas and Kentucky is the matter of distribution of royalty payment when there is a life estate and remaindermen. This is necessarily further complicated by the vagueness as to the exact rights of a surviving spouse under our laws regarding the descent and distribution of homestead property. The rights of the various parties are controlled not only by the usual rules regarding life estates and waste, but superimposed on these rules is the open mine doctrine which has been brought into the oil and gas field from the law of solid minerals. To simplify this problem it will be necessary first to review briefly the common law doctrines of waste related to the life estate before entering into a discussion of the open mine doctrine and its possible recognition and application in Mississippi.

II. Waste—Life Estates[1]

The commission of an act by one in possession of a limited estate which results in substantial injury to the inheritance is waste.[2] At early common law only three persons were punishable for waste; namely, guardian in chivalry, tenant in dower, and tenant by the curtesy.[3] These persons were the holders of legal life estates which were created by operation of law, as distinguished from conventional life estates which were created by contract.[4] The conventional life estates were not impeachable for waste unless it was expressly so provided in the instrument creating the estate, for it was held that the grantor could have so provided if he had wished.[5] However, with the passage of the Statute of Marlbridge in 1267 and the Statue of Gloucester in 1278, the rule was changed so that the conventional life estates and the estates for years were impeachable for waste unless the instrument otherwise provided.[6]

The above discussion as to the state of the common law in England is not without dispute. It should be noted that this discussion is based

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[1]See generally Kimbrough, *Waste in Mississippi Territory and State*, 7 Miss. L.J. 234 (1935).

[2]Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906).

[3]Guittard, *Rights of a Life Tenant*, 4 Texas B.J. 265 (1941).

[4]*Ibid.*

[5]*Ibid.*

[6]*Ibid.*

primarily upon the theories advanced by Lord Coke.[7] Many authorities would now differ and say that Coke erred when he stated that no cause of action existed for waste in the case of tenants for life and years, prior to the statutes of Marlbridge and Gloucester.[8] These authorities believed that an action as well as a remedy existed prior to the enactment of the statutes, and that actually the statutes did not create a new cause of action but simply served to make the remedy more specific and certain.[9]

Actually at this late date in the law of waste in Mississippi the argument as to which theory is correct is purely academic, but is of considerable interest to note the difference it could have made. Dean Kimbrough points out that practically all of the states of the Union by court decisions adopted the statutes of Marlbridge and Gloucester as a part of the common law of waste in a modified form in order to suit the changed conditions in this country. However, Mississippi was the only state to abrogate outright all of the statute laws of England and Great Britain.[10] Thus he would conclude that the statutes are not part of the law of waste in Mississippi, and this is supported by at least one early Mississippi case[11] in which it is stated that the Statute of Marlbridge is not a part of the jurisprudence of Mississippi. Thus if it is true that the statutes of Marlbridge and Gloucester are not law in Mississippi and prior to their enactment holders of conventional life estates were not liable for waste, then presumably this should be the present case law in Mississippi. However, the case of *Moss Point Lumber Company v. Harrison County*,[12] and other decisions,[13] has embedded in the jurisprudence of Mississippi the principle that holders of limited estates will be responsible for injury done to the inheritance.

What constitutes waste is determined by considering whether or not the act done results in injury to the inheritance, *i.e.* to the remainder or reversion.[14] The courts have held that the cutting of timber for sale[15]

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[7]Kimbrough, *supra* note 1, at 238.

[8]*Id.* at 242.

[9]*Id.* at 242-43.

[10]*Id.* at 257.

[11]See Jordan v. Roach, 32 Miss. 481 (1856).

[12]89 Miss. 448, 42 So. 290 (1906).

[13]Martin v. Humble Oil & Ref. Co., 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd* 298 F.2d 163 (5th Cir. 1961), *rehearing denied*, 301 F.2d 313, *cert. denied*, 371 U.S. 825 (1962); Dodds v. Sixteenth Section Dev. Corp., 232 Miss. 524, 99 So. 2d 897 (1958); Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 92 So. 2d 244 (1956); Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So. 2d 270, (1941); Cannon v. Barry, 59 Miss. 289 (1881).

[14]Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906).

[15]*E.g.*, Moss Point Lumber Co. v. Harrison County, 89 Miss. 448, 42 So. 290 (1906).

or the production of oil and gas[16] is waste, while an act such as building a reservoir upon the land is not waste.[17] Not only will the holder of the limited estate be responsible for waste, but the party dealing with such a tenant is charged with notice of the extent of the estate, and, if the tenant exceeds his authority, the one purchasing from him is not relieved from the obligation to respond in damages to the remaindermen for waste.[18]

It is clear that royalty is realty and thus the production of oil and gas constitutes waste.[19] Therefore, royalties are considered corpus, which must be preserved for the remaindermen, and the life tenant is only entitled to the use of the royalties, *i.e.*, interest on the royalties.[20] To this hard and fast rule there are three primary exceptions whereby the life tenant will be entitled to the royalty payments to the exclusion of the remaindermen.[21] These are: (1) the open mine doctrine; (2) express provision in the instrument creating the life estate that the life tenant shall hold without impeachment for waste; and (3) when the land is useless except for its minerals, the life tenant is generally permitted to extract the minerals without impeachment for waste.

III. Open Mine Doctrine[22]

In the absence of a stipulation or license to the contrary, the life tenant has no right to commit waste.[23] However, under the exception which exists in the open mine doctrine he may work mines which were open when the life tenancy began, even though the corpus is thereby depleted.[24] The open mine doctrine in its original form applied to solid mineral mining; under that situation the life tenant could open new

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[16]Martin v. Humble Oil & Ref. Co., 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd* 298 F.2d 163 (5th Cir. 1961), *rehearing denied,* 301 F.2d 313, *cert. denied,* 371 U.S. 825 (1962); Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 92 So. 2d 244 (1956); Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So. 2d 270 (1941).

[17]Dodds v. Sixteenth Section Dev. Corp., 232 Miss. 524, 99 So. 2d 897 (1958).

[18]Martin v. Humble Oil & Ref. Co., 199 F. Supp. 648 (S.D. Miss. 1960), *aff'd* 298 F.2d 163 (5th Cir. 1961), *rehearing denied,* 301 F.2d 313, *cert. denied,* 371 U.S. 825 (1962).

[19]Martin v. Eslick, 229 Miss. 234, 90 So. 2d 634, 92 So. 2d 244 (1956); Dougherty v. Greene, 218 Miss. 250, 67 So. 2d 297 (1953).

[20]Martin v. Eslick 229 Miss. 234 90 So. 2d. 635, 92 So. 2d 244 (1956); See 3 U.C.L.A.L. Rev. 601 (1956). *But see* First Nat'l Bank v. Commercial Nat'l Bank & Trust Co., 157 So. 2d 502 (Miss. 1963).

[21]1 Kuntz, Oil and Gas § 8.1 (1962).

[22]See generally 1 Kuntz, *op. cit. supra* note 21; 3A Summers, Oil and Gas § 613 (2d ed. 1958); 2 Tiffany, Real Property § 633 (3d ed. 1939); Woodward, *The Open Mine Doctrine in Oil and Gas Cases,* 35 Texas L. Rev. 538 (1957).

[23]See 2 Tiffany, *op. cit. supra* note 22.

[24]*Ibid.*

mines, but he could not open mines to a new vein.[25] Nor could the life tenant convert domestic mines, for example mines which were used to obtain coal for the home, into commercial mines.[26] In other words the life tenant was limited to the use for which the mines had been put by the grantor. With adaptation to the nature of oil and gas production these principles have been brought into the law of oil and gas.

When oil or gas is being produced at the time the life estate is created the life tenant is entitled to receive the proceeds of the production to the exclusion of the remaindermen. This includes not only wells that were producing at the time the estate was created but in addition wells which are drilled subsequently under the lease.[27] The rationale behind the doctrine is to carry out the presumed intention of the grantor of the life estate.[28] That is, the grantor devoted the land to the production of minerals, and it would be his intent that the grantee should use the land for the same purpose. When this element of intent of the grantor is introduced, many variations are possible and a few of the problems have reached the courts.

A situation where the open mine doctrine was involved has not been before the Mississippi Supreme Court; however, there is a strong suggestion in at least one case that the court would apply the doctrine.[29] In an opinion of the Court of Appeals for the Fifth Circuit that court appears to assume that Mississippi has recognized the doctrine.[30]

Perhaps the best way to understand fully the impact of the doctrine is to set forth the various problems that may arise, and then to present the case law and suggested results by the authorities in the oil and gas field.

IV. Examples—Open Mine Doctrine Application

A. In 1964 *X* conveys to *Y* for life with remainder to *Z*, and at the time of the conveyance there are producing wells on the land. *Y* will receive the total proceeds from the production.[31]

B. In 1960 *X* conveys to *Y* for life with remainder to *Z*. *X* had executed a lease to Oil Company in 1954 for a primary term of ten years. Production was not discovered until 1962, after the creation of

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[25]*Ibid.*

[26]*Ibid.*

[27]Warren v. Martin, 168 Ark. 682, 272 S.W. 367 (1925); *In re* Shailer, 266 P.2d 613 (Okla. 1954); Youngman v. Shular, 155 Tex. 437, 288 S.W. 2d 495 (1956).

[28]Woodward, *supra* note 22, at 541-542; 30 Texas L. Rev. 134 (1951).

[29]Martin v. Eslick, 225 Miss. 234, 90 So. 2d 634, 92 So. 2d 244 (1956).

[30]Martin v. Humble Oil & Ref. Co., 298 F.2d 163 (5th Cir. 1962).

[31]See Thompson v. Thompson, 149 Tex. 632, 236 S.W.2d 779 (1951); Annot., 18 A.L.R.2d 98, 106 (1951); Annot., 43 A.L.R. 811, 813 (1926).

the life estate. *Y* will receive the total proceeds from the production to the exclusion of Z.[32]

C. In 1950 *X* leases to Oil Company for a primary term of ten years. In 1958 *X* conveys to *Y* for life with remainder to Z. The lease expires in 1960 and no production has been found, does *Y*, the life tenant, have the right to execute a lease? *Y* cannot execute a lease himself, the joinder of the remainderman is necessary for the execution of a valid lease,[33] or the nonjoining party may ratify the lease given by the other.[34] However, an argument can be made to the effect that *X*, by executing the lease in 1950, has expressed an intent to devote the land to the production of oil or gas.[35] Perhaps the best statement of these arguments is given by Kuntz,[36] and following is a quotation from his article.

> One such problem involves the question of whether or not a life tenant, acting alone, may execute a valid oil and gas lease after the termination of an oil and gas lease that was in existence at the time the tenancy began. If emphasis be given to the grantor's intention to the effect that he intended that the land be dealt with as he had dealt with it, it would follow that the life tenant, acting alone, would have the power to grant a valid lease under such circumstances. On the other hand, if emphasis be placed on the authority of the existing lease as being the equivalent of an open mine, then the authority no longer exists after termination of the lease for the opening of mines or for the granting of leases.[37]

D. In 1964 *X* conveys to *Y* for life with remainder to Z. At time of the conveyance there are producing wells on the land. As explained in example "*A*" the life tenant receives the total proceeds. However, consider the effect if soon after the creation of the estate secondary recovery operations are begun and production is greatly increased. One of the few cases decided on the point holds that the life tenant is still entitled to the entire proceeds including the royalty on the oil resulting from secondary recovery operations.[38]

E. In 1950 *X* leases to Oil Company for a primary term of ten years, and production is established in 1952. In 1961 Oil Company abandoned

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[32]Koen v. Bartlett, 41 W. Va. 559, 23 S.E. 664 (1895); Annot., 18 A.L.R.2d 98, 111 (1951); Annot., 43 A.L.R. 811, 814 (1926); see Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956); 10 Sw. L.J. 449 (1956).

[33]Meredith v. Meredith, 193 Ky. 192, 235 S.W. 757 (1921); Martin v. Eslick, 229 Miss. 234, 90 So. 2d 635, 92 So. 2d 244 (1956); Barnes v. Keys, 36 Okla. 6, 127 Pac. 261 (1912); Annot., 18 A.L.R.2d 98, 115 (1951); 43 A.L.R. 811, 816 (1926).

[34]*E.g.*, Burden v. Gypsy Oil Co., 141 Kan. 147, 40 P.2d 463 (1935).

[35]See Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956) (dissenting opinion); Woodward, *supra* note 22.

[36]Kuntz, *Recent Developments in Oil and Gas Law*, 10 PRAC. LAW. 65 (1964).

[37]*Id.* at 73.

[38]*In re* Shailer, 266 P.2d 613 (Okla. 1954).

the production and the lease is thus terminated. In 1964 *X* conveys to *Y* for life with remainder to Z. The question arises as to whether *Y* by virtue of the application of the open mine doctrine will have the power to execute a valid lease without the joinder or ratification of Z, the remainderman. The answer is apparently that *Y* does not since the abandonment was permanent in nature.[39] A discussion of this subject in the Indiana case of *Andrews v. Andrews*[40] suggested a distinction where the abandonment is temporary in nature or the intent is not "permanent abandonment." The case cites English authority to the effect that even though the grantor may have ceased to use the mine for many years that the cessation may not have been permanent. However, it would seem questionable that this distinction would exist in oil and gas law since in most instances the production operation is carried on by a lessee rather than the grantor of the life estate and once the lease is terminated because of abandonment it would necessarily appear to be permanent in nature. Thus the situation would be the same as the one illustrated in example *"F."*

F. In 1950 *X* leased to Oil Company for a primary term of ten years. The lease by virtue of its terms expires in 1960, and in 1962 *X* conveys the land to *Y* for life with remainder to Z. It appears that *Y* could not execute a valid lease by himself,[41] and his contention to the contrary would be even weaker than the argument made by a life tenant in example *"E."*

G. In 1954 *X* is the owner of 640 acres. The west half of the section is under lease to Oil Company and there are producing wells on that half-section, but the east half of the section has never been under lease and has no producing wells. In 1964 *X* conveys the section to *Y* for life with remainder to Z. What are the rights of *Y*? *Y* is entitled to the entire proceeds from production on the west half of the land.[42] *Y* acting alone cannot execute a valid lease on the east half of the land, and if lease is executed by *Y* and Z then *Y* is entitled only to the interest on the royalty. The conclusion with respect to the east half is based upon the intent of the grantor,[43] who, by the very fact that he had not leased the land, shows an intent not to devote that

[39]See McIntosh v. Ropp, 233 Pa. 497, 82 Atl. 949 (1912).

[40]31 Ind. App. 189, 67 N.E. 461 (1903).

[41]See Daniels v. Charles, 172 Ky. 238, 189 S.W. 192 (1916).

[42]See note 31 *supra.*

[43]See Mitchell v. Mitchell, 151 Tex. 1, 6, 244 S.W.2d 803, 805 (1952) where the court speaking of a similar situation said, "Prior to Aurelia Mitchell's death the 200 acres covered by the Gainer lease had not been leased or drilled, and rights acquired under the 'open mine' doctrine are not applicable here." It should be noted, however, that subsequently different facts were found, 298 S.W.2d 236 (Tex. Civ. App. 1957) and ultimately the case was decided upon construction of the will. 157 Tex. 346, 303 S.W.2d 352 (1957).

portion of the land to oil or gas production.[44]

H. In 1950 *X* is the owner of 160 acres and executes a lease to Oil Company which lease conveys only rights below the top of the Selma Chalk which is a well established marker in the area. Immediately thereafter production is discovered below the top of Selma Chalk, but to the present time no lease has been given to rights to the strata above the top of the Selma Chalk. In 1958 *X* conveys all the land to *Y* for life with remainder to *Z*. In 1964 a "hot play" develops in the Wilcox, a reservoir above the top of the Selma Chalk, and *Y* claims that he has the right to execute a lease. It would appear that *Y* cannot execute a valid lease without the joinder of *Z*, the remainderman, and if a lease was so executed and production were found, *Y* would be entitled only to interest on the royalty.[45] Once again this conclusion is based upon what is the apparent intent of the grantor of the life estate. It cannot be said that his intent was to devote all strata to production since no lease was ever given on the strata above the top of the Selma Chalk.

I. In 1964 *X* died intestate owning a 160 acre homestead on which there were producing oil wells operated by Oil Company under a lease which had been executed by *X* and his wife *Y* in 1950. The question arises whether or not the wife takes such an estate in the homestead land so that she will take the entire proceeds from the production to the exclusion of remaindermen, the children of the marriage. The case law interpreting the homestead statute and the statutes of descent and distribution supports the proposition that the estate which the wife takes is not essentially different from the conventional life estate and thus she is entitled to the entire proceeds.[46] One of the main arguments against the wife taking to the exclusion of the remaindermen is based upon the intention of the grantor. It is argued that when the life estate is created by deed that the intention of the grantor is evident, but when the estate is created by operation of law that the intention of the grantor is not shown.[47]

This problem has not yet been encountered in Mississippi, but it would appear to be a vital one for the lawyers of the state. The following section presents a discussion of the Mississippi statutes, and the possible interpretation that could be anticipated under the homestead law.

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[44] 1 KUNTZ, *op. cit. supra* note 21, § 8.2.

[45] No authority is found for this factual situation, however, note that this situation differs from that presented in example "G" only by the fact that here we are considering vertical leasing rather than horizontal leasing as was there considered.

[46] Lawley v. Richardson, 101 Okla. 40, 223 Pac. 156 (1924); Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956); *cf.* Sewell v. Sewell, 363 Ill. 166, 1 N.E.2d 492 (1936). *Contra,* Brandenburg v. Petroleum Exploration, 218 Ky. 557, 291 S.W. 757 (1927); Annot., 18 A.L.R.2d 98, 149 (1951).

[47] Woodward, *supra* note 22.

V. Application of the Open Mine Doctrine to the Mississippi Homestead Law[48]

To present a logical view of what may develop as the rule in Mississippi with respect to the application of the open mine doctrine to the homestead law, it will first be necessary to examine the controlling statutes and the cases construing them in similar situations. Then a comparison of the Mississippi statutes with the statutes of states which have encountered the problem will be presented.

The declaration of a homestead is allowed by section 317 wherein it is provided:

> Every citizen of this state, male or female, being a householder, and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him or her, but the quantity of land shall not exceed one hundred and sixty acres . . . .[49]

Descent of the property is provided for in section 476 wherein it is stated:

> The property, real and personal, exempted by law from sale under execution or attachment, shall, on the death of the husband or wife owning it, descend to the survivor of them, and the children . . . . as tenants in common.[50]

While the above statute has absolutely no application if distribution of the property is provided for by will,[51] one alleging to be a tenant in common is not required to prove that his ancestor died intestate.[52] Assuming that the ancestor does die intestate, then regardless of whether the estate is solvent or insolvent[53] the property descends directly under the statute and is not to be administered.[54] Typical operation of the statute would be as follows: If intestate died leaving a widow and two children, then each would take a one-third (⅓) interest in the fee, or if one of the children predeceased the intestate and left issue, then these

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[48]See generally 3A Summers, *op. cit. supra* note 22; Annot., 18 A.L.R.2d 98 (1951).

[49]Miss. Code Ann. § 317 (1956).

[50]Miss. Code Ann. § 476 (1956).

[51]Osburn v. Sims, 62 Miss. 429 (1884); Norris v. Callahan, 59 Miss. 140 (1881); Turner v. Turner, 30 Miss. 428 (1855).

[52]Smith v. Stanley, 159 Miss. 720, 132 So. 452 (1931).

[53]De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513 (1934); Mason v. O'Brien, 42 Miss. 420 (1869).

[54]De Baum v. Hulett Undertaking Co., 169 Miss. 488, 153 So. 513 (1934); Wally v. Wally, 41 Miss. 657 (1868); Holliday v. Holland, 41 Miss. 528 (1867); Whitley v. Stephenson, 38 Miss. 113 (1859).

grandchildren would take per stirpes the one-third (⅓) share of their parent.[55]

The wife's interest is not confined to the child's share in the fee but is expanded by section 478 which gives to her a type of limited estate in the property to the exclusion of the children. The statute provides as follows:

> Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her *widowhood,* as long as it is *occupied or used* by the widow, unless she *consent.* Likewise, where a decedent leaves a widower to whom, with others, her exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during the period of his being a widower, as long as it is occupied or used by the widower, unless he consent. Provided that this act shall not affect any pending suit. (Emphasis supplied.)[56]

A determination of the quantum of the estate created in the surviving spouse by the operation of this statute will largely control whether the Mississippi court will apply the open mine doctrine to the estate of the deceased spouse.

From a reading of the statute[57] alone it is evident that the surviving spouse may retain possession of the estate for her life and resist partition unless one of three events occur.[58] If the spouse remarries,[59] ceases to occupy or use the land,[60] or if the spouse consents to partition then the additional estate which was obtained by virtue of the statute is lost. These points of the statute alone suggest that the surviving spouse has an estate that is very similar to a life estate, but is subject to termination upon the happening of certain events. In fact the Mississippi Supreme Court in several cases has indicated that they consider the estate to be one very similar to the life estate. In *Medford v. Mathis*[61] the court stated: "We are of the opinion that the estate or right or interest vested by the quoted statute in the widow is more nearly analogous to a life estate than to any other which it may be likened."[62]

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[55]*E.g.*, Martin v. Martin, 84 Miss. 553, 36 So. 523 (1904).

[56]Miss. Code Ann. § 478 (1956).

[57]*Ibid.*

[58]See notes 59, 60 *infra.*

[59]Jefcoat v. Powell, 235 Miss. 291, 108 So. 2d 868 (1959); see Middleton v. Claughton, 77 Miss. 131, 24 So. 963 (1899).

[60]Middleton v. Claughton, 77 Miss. 131, 24 So. 963 (1899) where the surviving spouse sold all of her rights; Tiser v. McCain, 113 Miss. 776, 74 So. 660 (1917) where widow did not occupy the land but used the income therefrom for her support, and it was held that the land could not be partitioned.

[61]176 Miss. 188, 168 So. 607 (1936).

[62]*Id.* at 193, 168 So. at 607.

Following the same reasoning in *Bohn v. Bohn*[63] the court stated: "The right of the widow has the attributes and incidents of a life estate, and the other heirs are vested with a future estate which takes effect in possession at the termination of the preceding estate or interest."[64] The *Medford* case imposed upon the surviving spouse some of the duties that are imposed upon the life tenant. In that case it was held that the surviving spouse must pay the ad valorem taxes and pointed out that in respect to the payment of ordinary taxes the obligations were the same as that of a life tenant.

The main variances of the estate of the surviving spouse from a life estate arises from the fact that the estate is a purely personal one and can not be transferred.[65] It is abundantly clear that a conveyance by a widow, who has homestead rights, of all her rights and interest conveys only her interest in the fee.[66] The estate which is created by section 478 is destroyed, since the protection furnished by it is clearly designated for the widow and not for a vendee of the widow.[67]

Thus while the question as to the exact quantum of the surviving spouse's estate has not arisen, the present case law has established a trend to the effect that for all practical purposes the court will treat the estate as a life estate. This would strongly support the view that the Mississippi Supreme Court would apply the open mine doctrine to the estate of the surviving spouse.

This position is supported by the decisions of other states construing statutes or constitutional provisions under similar situations. Such decisions and statutes or constitutional provisions are found in Oklahoma,[68] Texas,[69] and Arkansas,[70] but in Kentucky[21] the contrary rule prevails.

In Oklahoma the statute is to the effect that "upon the death of either husband or wife, the survivor may continue to possess and oc-

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[63]193 Miss. 122, 5 So. 2d 429 (1942).

[64]Bohn v. Bohn, 193 Miss. 122, 136, 5 So. 2d 429, 432 (1942).

[65]Middleton v. Claughton, 77 Miss. 131, 24 So. 963 (1899).

[66]*Ibid.*

[67]*Ibid.*

[68]Heyser v. Frankfort Oil Co., 316 F.2d 441 (10th Cir. 1963); Hembree v. Magnolia Petroleum Co., 176 Okla. 524, 56 P.2d 851 (1935); Lawley v. Richardson, 101 Okla. 40, 223 Pac. 156 (1924); OKLA. STAT. ANN. tit. 58, § 311 (Supp. 1963). Compare Baze v. Scott, 24 F. Supp. 806 (E.D. Okla. 1938).

[69]Youngman v. Shular, 155 Tex. 437, 288 S.W.2d 495 (1956); Petrus v. Cage Bros., 128 S.W.2d 537 (Tex. Civ. App. 1939); TEXAS PROB. CODE ANN. § 284 (1956).

[70]Warren v. Martin, 168 Ark. 682, 272 S.W. 367 (1925); ARK. CONST. art. 9, § 6; see Cherokee Constr. Co. v. Harris, 92 Ark. 206, 122 S.W. 485 (1909).

[71]Brandenburg v. Petroleum Exploration, 218 Ky. 557, 291 S.W. 757 (1927); KY. REV. STAT. § 427.070 (1962).

cupy the whole homestead. . . .[72] In one of the leading cases[73] construing this portion of the statute the court was squarely faced with a situation where production was established before the husband died and the widow claimed right to the entire proceeds from the production. The court affirmatively held that the words of the statute were sufficient to vest in the widow the equivalent of a life estate, and that the open mine doctrine applied with equal force to the homestead rights of the surviving widow during the time the property was used and occupied as a homestead.[74]

Similarly, the Texas statute provides that "the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the widow, or so long as she elects to use or occupy the same as a homestead. . . ."[75] In *Petrus v. Cage Brothers*[76] the husband had opened caliche pits on the homestead before his death; after his death the widow executed an agreement permitting another to operate the mines. A dispute arose as to who was entitled to the income from these pits. The court pointed out that the case turns on the question of the character of the estate of the widow in homestead which descended to the children in fee subject to the rights of the widow. In holding that the widow was entitled to the entire proceeds of the pits by virtue of the open mine doctrine the court used the following key language: "The right encompasses every element of a life estate, and is therefore at least in the nature of a legal life estate, or, in other words, a life estate created by operation of law."[77] The case was followed by the much discussed *Youngman v. Shuler*.[78] It should be noted that the Texas statute differs from the Mississippi statute only by the fact that in Mississippi the widow's right is subject to termination if she subsequently remarries.[79]

In Arkansas the courts have encountered almost the identical problem where the lease under which production was discovered was executed before the death of the husband.[80] There the court then

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[72]OKLA. STAT. ANN. tit. 58, § 311 (Supp. 1963). Compare MISS. CODE ANN. § 478 (1956) where it is stated, "the same shall not be subject to partition . . . during widowhood, as long as it is occupied or used by the widow."

[73]Lawley v. Richardson, 101 Okla. 40, 223 Pac. 156 (1924).

[74]223 Pac. at 159.

[75]TEX. PROB. CODE ANN. § 284 (1956); see TEX. PROB. CODE ANN. § 283 (1956).

[76]128 S.W.2d 537 (Tex. Civ. App. 1939).

[77]*Id.* at 538.

[78]155 Tex. 437, 288 S.W.2d 495 (1956).

[79]MISS. CODE ANN. § 478 (1956).

[80]Warren v. Martin, 168 Ark. 682, 272 S.W. 368 (1925); see Cherokee Constr. Co. v. Harris, 92 Ark. 206, 122 S.W. 485 (1909).

summed up the character of the widow's estate and the application of the open mine doctrine to that estate by saying, "[S]he was entitled to receive the rents or production of the soil above or below the surface of the land by virtue of her homestead rights therein."[81] The provision of the Arkansas statute states:

> If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life; provided, that if the owner leaves children, one or more, said child or children shall share with said widow. . . .[82]

Apparently, Kentucky is the only state which has encountered the problem and has held that the wife does not take an estate in the homestead to which the open mine doctrine can be applied. The statute reads to the effect that the "homestead shall be for the *use of* the widow as long as she occupies it. . . ." (Emphasis added.)[83] The leading oil and gas case[84] construing this statute holds that the widow has only a right of occupancy and use of the surface.

It is noted that the Kentucky statute can be distinguished from the Texas[85] and Mississippi[86] statutes only by the fact that in Kentucky the homestead "shall be for the use of the widow" while in the other jurisdictions the statute says that the land shall not be partitioned while the widow continues to use or occupy. The different results are a product of the court's belief as to the intention or purpose to be accomplished by the particular law. The Oklahoma statute[87] differs from the Kentucky law in the same respect except there the statute reads that the wife may continue to possess or occupy the whole homestead.

By way of review it has been shown in this section that Mississippi has not had occasion to squarely decide the character of the estate of the widow in the homestead which descends to the children in fee. However, in several cases the Mississippi Supreme Court expressed the view that the estate is more than a mere right of occupancy or use, and is in the nature of a life estate. One case regarding taxes has impressed the affirmative duties of a life tenant upon the widow occupying the homestead. A conclusion that Mississippi when faced with the problem would affirmatively define the estate as one possessing the rights of a life estate is strongly supported by the cases in Oklahoma, Texas and Arkansas which have construed similar statutes to that effect.

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[81]Warren v. Martin, 168 Ark. 682 272 S.W. 367, 371 (1925).

[82]Ark. Const. art. 9, § 6.

[83]Ky. Rev. Stat. § 427.070 (1962).

[84]Brandenburg v. Petroleum Exploration, 218 Ky. 557, 291 S.W. 757 (1927).

[85]Tex. Prob. Code Ann. § 284 (1956).

[86]Miss. Code Ann. § 478 (1956).

[87]Okla. Stat. Ann. tit. 58, § 311 (Supp. 1963).

VI. A Caveat to the Surviving Spouse

Assuming that the writer is correct in suggesting that Mississippi will recognize the open mine doctrine and that it is logical Mississippi would apply the doctrine to the homestead estate, still the occupant of the homestead estate must exercise great care in at least one area. As previously pointed out the continuance of the estate is conditioned upon use or occupancy[88] and a cessation of use or occupancy will terminate the estate because it has been abandoned. In Oklahoma[89] and Arkansas[90] it has been held that a purported conveyance of the minerals by the surviving spouse constitutes abandonment even though the surface is still occupied as a homestead.[91]

Based upon the case of *Middleton v. Claughton*[92] it would appear beyond doubt that the result in Mississippi would be the same as that reached in Oklahoma and Arkansas. In that case the widow sold all of her rights and interest in homestead and the vendee who was her son-in-law brought suit for partition. The court in allowing partition said, "She certainly does not use the lands for she has by deed conveyed all her interest in them, has removed from them, and has no right to occupy or use them."[93]

VII. Conclusion

It has been shown that by majority rule the states which have considered the open mine doctrine have applied it and there is every reason to believe that Mississippi would follow these authorities. There is implication to this effect in one Mississippi case, and one federal case seems to assume that Mississippi has applied or would apply the doctrine. Whether or not Mississippi would apply the doctrine to the homestead estate has not been before the court. However, at least two factors strongly suggest that Mississippi would follow Texas, Oklahoma, and Arkansas and apply the doctrine. These two factors are: (1) The statutes in the above listed states closely parallel the one in Mississippi; (2) the existing case law in Mississippi strongly suggests that the court regards the estate of the surviving spouse as essentially a life estate subject to termination upon the occurrence of certain events.

Richard D. Foxworth

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[88]Miss. Code Ann. § 478 (1956).

[89]Hembree v. Magnolia Petroleum Co., 176 Okla. 524, 56 P.2d 851 (1935).

[90]Warren v. Martin, 168 Ark. 682, 272 S.W. 367 (1925).

[91]Kuntz, *Recent Developments in Oil and Gas Law*, 10 Prac. Law. 65, 74 (1964).

[92]77 Miss. 131, 24 So. 963 (1899).

[93]*Id.* at 135, 24 So. at 964.

Recent Decisions

Criminal Law—Mental Examination—Requirement of Reasonable Probability for Commitment and Method of Attacking Commitment

Defendant, indicted for murder in the Circuit Court of Hinds County, pleaded not guilty upon arraignment, after which the state asked the court to order defendant to submit to a mental examination by a competent psychiatrist to determine his ability to make a defense. Defendant and his attorneys asserted that he was capable of making a rational defense and objected to such an examination on the ground that it was a denial of due process of law. The Circuit Judge of Hinds County, after a hearing, held that there was a probability of present insanity and ordered the accused to be examined by a psychiatrist at the hospital at Whitfield in Rankin County. This order was made under the provisions of the statute[1] enacted in 1960 relating to mental examinations. Defendant then filed a petition for writ of habeas corpus to the judge of the Eighth Circuit Court District which includes Rankin County. This judge found that defendant was capable of making a rational defense, and the petition for writ of habeas corpus was sustained, defendant being discharged from the hospital to await trial. Held: Affirmed. A reasonable probability that accused is incapable of making a rational defense must exist before he can be ordered to undergo a psychiatric examination, and the writ of habeas corpus may be used to attack such an order or judgment committing a person when there is an absence of reasonable probability. *Jaquith v. Beckwith,* 157 So. 2d 403 (Miss. 1963).

At common law a person who was incapable of making a rational defense could not be required to plead to an indictment or be tried for a crime.[2] This has been incorporated into the law of most states by statute. It is well established in this jurisdiction that a person who is presently insane cannot be tried.[3] A person who becomes insane after arraignment should not be tried nor should a person be sentenced or punished while insane.[4] It is evident that some method must be used to determine the sanity of an accused when a question arises as to his sanity or his ability to make a rational defense. It is settled law in Mississippi that every man is presumed to be sane.[5] This presumption applies not only to the time of the commission of the alleged crime but also to every other time in the defendant's life.[6] This presumption of sanity is found in the courts of all the states and in the federal courts.[7] The common law method of determining the present mental condition of the accused rested in the discretion of the trial judge. By statute in

[1]Miss. Code Ann. § 2575.5 (Supp. 1962).

[2]Weihofen, Mental Disorder As A Criminal Defense 428-29 (1954).

[3]Hawie v. State, 121 Miss. 197, 83 So. 158 (1919) [cited as *Howie* in the Southern Reporter].

[4] *Ibid.*

[5]Gambrell v. State, 238 Miss. 892, 902, 120 So. 2d 758, 762 (1960); Cunningham v. State, 56 Miss. 269, 276 (1879).

[6]Comment, 32 Miss. L.J. 74, 83 (1960).

[7]Weihofen, Mental Disorder As A Criminal Defense 214-19 (1954).

most jurisdictions today the trial judge still retains some discretion in determining whether an inquiry should be made.[8] The statutes often provide that an inquiry shall be made if the court has reasonable grounds to believe that the defendant is insane.[9] The pertinent statute in Mississippi provides that if the mental condition of a person indicted for a felony is in question, the court or judge, on a motion made by either the defendant or the prosecution or on its own motion, may order the defendant to submit to a mental examination to determine his ability to stand trial.[10] The court in construing this section has implied that there must be a *reasonable probability* that the accused is incapable of making a rational defense to warrant the psychiatric test.[11] A separate trial or preliminary hearing on the issue of insanity is properly denied when there are no reasonable grounds to believe that the accused is incapable of making a rational defense.[12] In the instant case the court noted that the trial judge has a reasonable discretion when acting under the statute but that this discretion is a judicial one, including a requirement that there must be some reasonable probability of insanity before an accused can be committed to a hospital for lengthy psychiatric examination. Here the court found no evidence which raised a reasonable question or doubt as to defendant's ability to make a rational defense.

Consideration should now be given to the remedy available to a person who has been ordered to submit to a mental examination when he contends that there was no evidence to create a question of reasonable probability as to sanity. It should first be mentioned that an order submitting an accused to a hospital for a mental examination is an interlocutory order. Generally, appeals in this jurisdiction are allowed only from final judgments and not from interlocutory orders.[13] In the instant case no appeal could be taken to the supreme court on the order for the mental examination. The question is then whether the accused can use the writ of habeas corpus. The writ of habeas corpus is provided for in the constitution[14] of this state and also in the code.[15] This writ, as used in England, was a remedy to inquire into the cause of imprisonment or restraint and thereby to secure the speedy release of those illegally restrained of their liberty.[16] It is well settled that the writ of habeas corpus can not perform the functions of a writ of error or an appeal.[17] It is also the general rule that where the trial court has jurisdiction of the offense and of the person of the defendant and power

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[8]*Id.* at 428-29, 441-42.

[9]*Id.* at 441-42.

[10]Miss. Code Ann. § 2575.5 (Supp. 1962).

[11]McGinnis v. State, 241 Miss. 883, 891-95, 133 So. 2d 399, 401-02 (1961). On the requirement of reasonable probability before the statute was passed, see Eslick v. State, 238 Miss. 666, 672, 119 So. 2d 355, 358 (1960); Robinson v. State, 223 Miss. 70, 81, 77 So. 2d 265, 269 (1955); Shipp v. State, 215 Miss. 541, 550, 61 So. 2d 329, 331 (1952).

[12]Skinner v. State, 198 Miss. 505, 510-11, 23 So. 2d 501, 502 (1945); Davis v. State, 151 Miss. 883, 119 So. 805 (1929).

[13]Miss. Code Ann. § 1150, 1945 (1956).

[14]Miss. Const. art. III, § 21.

[15]Miss. Code Ann. § 2815 (1956).

[16]McNally v. Hill, 293 U.S. 131 (1934).

[17]*E.g.*, Kelly v. Douglas, 164 Miss. 153, 144 So. 2d 237 (1932).

to render the particular judgment or sentence, it cannot be collaterally attacked in habeas corpus proceedings.[18] But where the judgment or proceedings are void on their face and subject to collateral attack, then relief may be granted on habeas corpus.[19] Habeas corpus may also be used to obtain relief where a court makes an order which it had no power to make, although it had general jurisdiction of the parties and of the subject matter.[20] It is evident that the judgment or order of the Circuit Court of Hinds County would have to be considered a void order for the judge of the Eighth Circuit Court District to release the prisoner from the state hospital. This judge held that the order committing Beckwith to submit to a mental examination was void and therefore was subject to collateral attack by a writ of habeas corpus.

The *Beckwith* case presented a unique aspect of procedural law in Mississippi. It is submitted that the court reached the right result in this case but only because the accused would have been without any remedy if the petition for writ of habeas corpus had been denied. This is so because the order committing the accused to the hospital for a mental examination was an interlocutory order from which an appeal did not lie to the supreme court. It was impossible for the accused to attack this order by a writ of error coram nobis because that writ applies only to situations where there has been an error of fact not appearing on the face of the record, which fact was unknown to the court, and which, if known in season, would have prevented the rendition and entry of the judgment challenged.[21] Therefore, under the limited circumstances within which the present case falls the writ of habeas corpus was properly allowed. However, it is submitted that this case could present procedural difficulties in the future, and an enormous amount of litigation might develop if the judge of one circuit court is allowed, in effect, to assume jurisdiction and modify or reverse an order or judgment of the court originally hearing the case. Generally, where a court has acquired jurisdiction of a case, no other court may interfere with its action as to matters concerning which it has acquired jurisdiction.[22] Certainly a method should be devised whereby a person will have a remedy if he is ordered to submit to a mental examination under section 2575.5. It is suggested that the Mississippi legislature pass a statute which will allow a direct appeal to the supreme court in cases and situations arising under section 2575.5. Such a statute would provide a remedy to a person who contends that he was ordered to submit to a mental examination when there was no reasonable probability that he was incapable of conducting a rational defense. If such a statute were passed the writ of habeas corpus would no longer be the proper method by which to attack the judgment of the circuit court issuing the

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[18]39 C.J.S. *Habeas Corpus* § 26 (1944).

[19]*E.g.*, Kelly v. Douglas, 164 Miss. 153, 144 So. 2d 237 (1932).

[20]*E.g.*, State v. Chambliss, 142 Miss. 256, 275-79, 107 So. 200, 205-06 (1926).

[21]Carraway v. State, 163 Miss. 639, 141 So. 342 (1932); Fugate v. State, 85 Miss. 94, 37 So. 554 (1904). See generally Farley, *Coram Nobis—Another View*, 6 Miss. L.J. 327 (1933); McKay, *Necessity For Right Of Appeal From Denial of Writ Of Error Coram Nobis*, 6 Miss. L.J. 143 (1933); Rosenthal, *Writ of Error Coram Nobis*, 6 Miss. L.J. 133 (1933); 28 Miss. L.J. 236 (1957).

[22]Hawie v. State, 128 Miss. 473, 91 So. 131 (1922). See 25 Am. Jur. *Habeas Corpus* § 108 (1940).

committing order. This would eliminate any problem of judges of courts of equal rank modifying or reversing orders that were issued by some other court. The passage of a statute allowing a direct appeal would seem to stabilize the law in this area and would safeguard the rights of accused persons by giving them a much speedier and more sound remedy than they have at present.

John A. Travis, III

Evidence—Fruit of the Poisonous Tree—Testimony of Eyewitness not Excluded

One defendant was convicted of second degree murder and robbery and the other of robbery. The crucial evidence against defendants was the testimony of an eyewitness, whose existence and identity was learned from them by police during a period of illegal detention.[1] The district court ruled that the oral and written confessions of defendants and the victim's wrist watch, all of which were obtained from defendants during this period of illegal detention, were inadmissible as evidence. However, that court refused to exclude as "poisoned fruit" the testimony proffered by the eyewitness. Held: Affirmed. The human element involved in the testimony of the eyewitness, as distinguished from an inanimate evidentiary object, so attenuated the relationship between the witness's testimony and defendants' inadmissible confessions that there was no rational reason for excluding such testimony. *Smith v. United States,* 324 F.2d 879 (D.C. Cir. 1963).

What is popularly called the *McNabb* rule refers to that body of law which had its inception in a decision[2] in which the United States Supreme Court refused to admit into evidence confessions obtained during an illegal detention. Implicit in the rule are three important subsequent holdings[3] of the Court in which the rule was clarified and defined. As it emerges today the rule is simply applied. One need ask only whether the defendant was being illegally detained when he confessed and if the answer is affirmative the evidence must be suppressed; if negative the rule does not exclude such evidence.[4] This exclusionary rule of evidence was formulated by the Supreme Court as an exercise of its supervisory authority over the administration of criminal justice in the federal courts.[5] Its express purposes are to protect the innocent from unlawful arrest, to avoid the evil implications of secret interrogation of the accused, and to extinguish the use of third degree tactics by arresting officers.[6] Although it would seem that the Supreme Court has laid a solid foundation for the application of the *McNabb* rule,[7] a new

[1]See Fed. R. Crim. P. 5(a). This rule requires an arresting officer to take the arrestee "without unnecessary delay before the nearest available commissioner. . . ." The delay was sixty hours for one defendant and forty hours for the other in the instant case.

[2]McNabb v. United States, 318 U.S. 332 (1943).

[3]Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); United States v. Mitchell, 322 U.S. 65 (1944).

[4]Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 Geo. L.J. 1, 20 (1958).

[5]McNabb v. United States, 318 U.S. 332, 341 (1943).

[6]*Id.* at 343-44.

[7]See cases cited note 3 *supra.*

threat to its recently acquired clarity is arising in the form of decisions as to what constitutes "fruits of the poisonous tree" that will come within its scope.[8]

The "tainted fruit" metaphor was employed in a variety of factual situations before the *McNabb* rule was formulated.[9] Due to this varied application, both before and since *McNabb*, a reading of the cases impels one to ask the question: What exactly is the nature of this fruit? In the majority of cases it would appear that the "poisonous tree" is the illegal detention itself and any evidence, either physical or verbal, resulting directly from that detention is "tainted fruit."[10] In other cases, however, the "tainted fruit" would not appear to be the physical or verbal evidence obtained from the accused, but other evidence or leads to other evidence gained as a direct result of the *content* of this physical or verbal evidence.[11] In still other cases the "tainted fruit" seems to appear after the illegal detention is terminated.[12] As early as 1920 the Supreme Court held that a lead to evidence obtained from an independent source, *i.e.*, other than from the accused during an illegal detention, would be free from taint.[13] The Court has likewise held that it is possible for the discovery of the challenged evidence to be so attenuated from the illegal detention as to dissipate the taint.[14] Since the lead to the eyewitness's testimony, in the principal case, was obtained from the accused during an illegal detention, the court had to find justification for its decision in the "attenuation doctrine."

The long and varied application of the "tainted fruit" metaphor, under these obviously indefinable guide lines, has provided the federal judges a vehicle by which to indicate their personal feelings about the general propriety of the *McNabb* rule. This seems to have been indulged in by the Court of Appeals for the District of Columbia in a number of cases rendered by three-judge panels since the *Mallory* decision was handed down by the Supreme Court.[15] It is submitted that such indulgence is evident in the principal case. In a 1962 "tainted fruit" case[16] the court of appeals sitting *en banc* split 5 to 4 in favor of suppressing a second confession made after arraignment but so proximately in time to the period of illegal detention and the first confession that it constituted "tainted fruit." It is submitted that of the three-judge panel which heard the principal case two justices who were among the dissent in that 1962 case have expressed themselves in the principal case as being in favor of limiting the application of *McNabb*. As the

[8]See, *e.g.*, Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 863 (1960).

[9]*E.g.*, Nardone v. United States, 308 U.S. 338 (1939).

[10]See, *e.g.*, Mallory v. United States, 354 U.S. 449 (1957).

[11]See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

[12]See, *e.g.*, Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). A second confession was made *after* arraignment but so proximately in time to the period of illegal detention as to be tainted.

[13]Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[14]Nardone v. United States, 308 U.S. 338, 341 (1939).

[15]See, *e.g.*, Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 941 (1961).

[16]Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962).

majority in this case, they have based their decision on the well-recognized "attenuation doctrine," but in order to do so they have had to make a distinction between physical and verbal evidence unwarranted by any Supreme Court decision dealing with the "tainted fruit doctrine."[17] There seems to be no practical difference between allowing the use of illegally obtained self-incriminating evidence against an accused and allowing an illegally discovered eyewitness to use the same evidence against him. It is submitted that if the *McNabb* rule is to retain its recently acquired clarity and by so doing effectuate the long-range objectives of the Supreme Court, that body presently will have to clarify the applicability of the "tainted fruit" metaphor in a factual surrounding governed by the *McNabb* rule.

Joe. T. Dehmer, Jr.

Federal Jurisdiction—Doctrine of Abstention—Clarification of Procedure To Be Followed In State Courts

Plaintiffs filed suit in federal district court for an injunction and declaration that a state act violated their rights under the fourteenth amendment. A three-judge court invoked the doctrine of abstention. Plaintiffs brought the proceedings in state court, but did not limit the suit to the question of whether or not the act applied to them and unreservedly included the constitutional question for decision. The Supreme Court of Louisiana declined to review the decision of the lower court, which held for defendants. Upon plaintiffs' return to federal district court, defendants' motion to dismiss was sustained on the ground that since the state court had passed on all issues raised, including the constitutional question, the court had no power to review. Held: Reversed and Remanded. A litigant foregoes his right under the abstention doctrine to return to federal district court for determination of his federal claims by freely and without reservation submitting his federal claims to state court for decision, but this rule will not be applied in the instant case inasmuch as plaintiffs' reliance on mistaken view that they were required to litigate their federal claims in state courts was not unreasonable. *England v. Louisiana State Bd. of Medical Examiners,* 84 Sup. Ct. 461 (1964).

There is a persistent notion that when a case comes properly within the jurisdiction of a federal court, the court is under a duty to exercise its jurisdiction and decide the case. The notion may have had its origin in dicta of Chief Justice Marshall in the early case of *Cohens v. Virginia.*[1] It is probably true that there never was such a rule uniformly applied in federal courts.[2] It is surely true that in the last two decades the Supreme Court has developed and frequently applied a doctrine of "abstention" from the exercise of jurisdiction.[3] This doctrine, usually confined to suits in equity, is based on two major considerations of judicial policy: first, a desire to avoid the unnecessary decision of

[17]See, *e.g.*, Wong Sun v. United States, 371 U.S. 471, 486 (1963).

[1]19 U.S. (6 Wheat.) 264 (1821).

[2]Wright, Federal Courts § 52 (1963).

[3]*Ibid.*

federal constitutional questions, and second, a respect for the independence of sovereign states.[4] In a typical abstention case, an injunction is sought in a federal court, on both state and federal grounds, against the application of a state statute or administrative order; the federal court, deeming it politic to abstain from deciding the state issues before the state's highest court has had an opportunity to resolve them authoritatively, directs the plaintiff to pursue his state remedies. The seminal case in this area, usually cited as the originator of the abstention doctrine, is *Railroad Comm'n v. Pullman Co.*[5] In that case the Court ordered the trial court to abstain from deciding the case but to retain jurisdiction until the parties had an opportunity to obtain from the state court a decision on the state issues involved. In this way the non-federal questions are left for the state courts to decide, as is appropriate; and the federal court avoids deciding a federal constitutional question prematurely or unnecessarily. If the federal court simply dismisses the suit, as has been done in several cases,[6] the whole litigation is shifted to the state courts where the plaintiff must urge all federal and state grounds. Appeal or certiorari on federal questions may then be taken to the Supreme Court of the United States from the highest court of the state.

After the federal court has abstained, the plaintiff has been faced with something of a dilemma. The words of the federal courts' decrees, as we have seen in the *Pullman Co.* case, seem to remit the plaintiff to the state courts for a determination of state issues only. On the other hand, if it later developed that he could have presented his federal issues to the state courts, the plaintiff might find that failure to present them operated to bar him from litigating them in the federal courts,[7] unless, of course, the area of abstention is an exception to the normal principals of res judicata.[8] This problem of litigation of both state and federal issues in state court has confronted the bench and bar on numerous occasions. In a few cases it has been clear that the federal court was asking the state court to decide only state issues.[9] However, the directive to the state court usually is not this explicit.[10] In fact, one case held that after the federal court had abstained, the plaintiff not only could but was required to present his federal claims to the state court.[11] The principal case[12] has held that interpretation of the decision to be erroneous. The federal court's directive did not imply that the state court should decide the federal issues, but it simply stated that the state court might interpret the statute differently in the light of constitutional objectives.[13] The field was further complicated in *NAACP*

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[4]See Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[5]*Ibid.*

[6]*E.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[7]See RESTATEMENT, JUDGMENTS § 63, Comment *a* (1942).

[8]See Note, 59 COLUM. L. REV. 749, 774 (1959).

[9]See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

[10]See Spector Motor Serv., Inc. v. Walsh, 135 Conn. 37, 61 A.2d 89 (1948).

[11]See Government & Civil Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957).

[12]England v. Louisiana State Bd. of Medical Examiners, 84 Sup. Ct. 461 (1964).

[13]*Id.* at 467.

v. Butler[14] in which the court said that a litigant has the right to return to district court unless he not only litigated his federal claims in the state tribunals but also sought review of the state decision in the Supreme Court.[15]

These decisions would seem to indicate that the doctrine of abstention is a useful and sound invention, but its utility has been diminished because of the lack of clear-cut guides to its applicability. The instant case goes a long way toward dispelling the confusion surrounding the procedure which a litigant should follow in a state court, after a federal court has abstained, in order not to lose his right to return to the federal court. The Supreme Court specifies that a party may forestall any conclusion that he has elected not to return to district court for a decision on his federal claims by making on the state record a specific reservation to that effect. The Court points out, however, that this reservation will in no way be considered indispensable and that the litigant will not be denied his right to return to the district court unless it clearly appears that he voluntarily did more than inform the state court of his federal claims and in addition fully litigated those claims in the state court.

Roger M. Flynt, Jr.

TORTS—DEFECTS IN DESIGN OR CONSTRUCTION OF ELABORATE STRUCTURE—EMPLOYER LIABLE TO EMPLOYEE OF INDEPENDENT CONTRACTOR

The plaintiff, an employee of an independent contractor engaged in constructing storage bins for the defendants, brought this action for personal injuries sustained when the incompleted structure upon which he was working collapsed as the foundation furnished by the defendants gave way. The two theories of negligence presented to the jury were based on defendants' alleged failure to exercise reasonable care to furnish a reasonably safe foundation for the work, and their alleged failure to exercise reasonable care to remove beans from the incompleted structure within a reasonable time after being requested to do so. Judgment was entered on a jury verdict for the plaintiff. HELD: Affirmed. Where a person is not competent himself to design and supervise the construction of an elaborate or complicated building or structure, and fails to employ an architect or some other competent person to design and supervise such construction, he is liable to an employee of his contractor for such injuries as may be proximately caused as the result of the faulty design or construction. *Whatley v. Delta Brokerage & Warehouse Co.*, 159 So. 2d 634 (Miss. 1964).

The liability of an employer for injuries arising out of the services rendered by an independent contractor may be found in the negligence of the employer[1] or in the exceptions to the common law rule that the employer is not liable vicariously for the torts of the independent contractor.[2] The more important exceptions[3] arise when the duty of the

[14]371 U.S. 427 (1963).

[15]England v. Louisiana State Bd. of Medical Examiners, 84 Sup. Ct. 461 (1964).

[1]PROSSER, TORTS § 64 (2d ed. 1955).

[2]Crescent Baking Co. v. Denton, 147 Miss. 639, 112 So. 21 (1927).

[3]PROSSER, TORTS § 64 (2d ed. 1955).

employer to the plaintiff is considered non-delegable[4] or when the work to be done is "intrinsically dangerous"[5] or will be dangerous unless precautions are taken.[6] Under such circumstances liability has been placed on the employer for the negligence of the independent contractor[7] and for the negligence of the servant of the independent contractor;[8] but, as between the employer and his own employee, it has been said that the latter assumes the risk when he is employed to repair existing defects,[9] or where a changing risk or danger arises during the construction of a building.[10]

On the other hand when an employee of an independent contractor brings an action grounded in tort arising out of defects in the design or construction of a building, as in the instant case, the decision may turn on a close factual situation from which the courts must determine the duty and the standard of care required of the employer. The Mississippi court held in an earlier case that the employer was not liable where he hired an independent contractor who furnished his own plans.[11] The court distinguished the earlier case from the instant case on the grounds that in the former case the contractor was competent, the building was a simple one, and there was no duty to furnish the services of an architect, while in the instant case the structure was a complicated one requiring the service of an architect or other competent person. It has been said that a competent contractor is a person who not only has an occupation, but reasonable skill in performing the tasks pertaining to it.[12] Where the building is an elaborate one it has been held that the employer's duty as to defects in design or construction is discharged if he exercises reasonable care in selecting an architect to prepare the plans and to build accordingly[13] unless the defects were such that he should have known of them[14] or he is advised of the defects and he proceeds.[15] If the employer submits the plans himself, there is a duty not to submit defective ones.[16]

The court could have properly disposed of the instant case on either or both of the two theories of negligence before it without reaching the present holding. However, the rule as stated for the first time by the Mississippi court properly places the duty of guarding against defects upon the employer when he employs an independent contractor to construct an elaborate or complicated structure. At first blush the decision may appear to extend the liability of the employer in the employer-independent contractor relationship by restricting his immunity from liability in tort. It is submitted that the case does not

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[4]See generally 30 Miss. L.J. 203 (1959).

[5]*Ibid.*

[6]Restatement, Torts § 413, 416 (1934).

[7]Covington & Cincinnati Bridge Co. v. Steinbrock & Patrick, 61 Ohio St. 215, 55 N.E. 618 (1899).

[8]Richmond Bros. v. Miller, 131 Ohio St. 424, 3 N.E.2d 360 (1936).

[9]Waterman-Fouke Lumber Co. v. Miles, 135 Miss. 146, 99 So. 759 (1924).

[10]Craig v. Craig, 192 Miss. 271, 5 So. 2d 673 (1942).

[11]See May v. Vardaman Mfg. Co., 244 Miss. 261, 142 So. 2d 18 (1962).

[12]Mullick v. Brocker, 97 S.W. 549, 551 (St. Louis City Ct. App. 1905).

[13]Burke v. Ireland, 166 N.Y. 305, 59 N.E. 914 (1901).

[14]Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914).

[15]Board of Comm'rs v. Vickers, 62 Kan. 25, 61 Pac. 391 (1900).

[16]See Meier v. Morgan, 82 Wis. 289, 52 N.W. 174 (1892).

extend the employer's liability but rather it clearly defines the positive duty of an employer, who lacks the required skill, to hire a competent independent contractor or an architect. To require an employer, who seeks to benefit from the end result, to exercise reasonable care to prevent defects which could foreseeably arise and cause injury if the building and construction of a complicated structure were entrusted to an incompetent contractor, is to apply the normal standard.

William M. Dye, Jr.

Wills—Validation by Codicil—Republication or Incorporation by Reference

On the same piece of paper which contained the latter part of an unsigned will there was a subsequent codicil signed by the decedent; both instruments were wholly in decedent's handwriting. The chancellor entered a decree that the will was valid. Held: Affirmed. The will, invalid initially for want of signature, was republished and validated by the addition of the signed codicil. *Hogan v. Sillers,* 151 So. 2d 411 (Miss. 1963).

An aged testatrix executed a codicil to her prior will; contestant claimed lack of mental capacity and undue influence in the execution of both instruments, but presented no substantial evidence regarding invalidity of the codicil. The chancellor peremptorily instructed the jury to find for proponents. Held: Affirmed. The valid codicil republished and validated the will even if it was originally defective for want of testamentary capacity or because of undue influence upon the testatrix. *Alden v. Lewis,* 160 So. 2d 181 (Miss. 1964).

Before a court decides, in a case of first impression, upon what grounds a valid codicil cured a defect in a prior testamentary instrument, it should first consider the defect.[1] One instrument may never have achieved any validity because of a lack of compliance with the formal requisites of execution and attestation; another may have been properly executed and attested yet inoperative from the start because the testator did not have sufficient mental capacity to make a will or because he was unduly influenced in the drawing of the instrument; and a third may have come into existence as a valid living will only to be later suspended or revoked. Courts have been wont to lump together all of these cases and to speak indiscriminately of republication by codicil as a mutual remedy.[2] In contrast, textual authorities agree that the more proper approach, logically and semantically, is to treat an instrument which realizes validity for the first time upon the execution of a subsequent codicil as falling under the doctrine of incorporation by reference.[3] The distinction which is drawn is that something which has never lived in the first place cannot thereafter be revived or republished but can be incorporated, by a proper reference, into a valid codicil or will.[4] How-

[1]See Atkinson, Wills § 90, at 467 (2d ed. 1953).

[2]See Annot., 21 A.L.R.2d 821 (1952).

[3]2 Bowe & Parker, Page on Wills § 23.1, at 573 (new rev. treatise 1960); Atkinson, Wills § 90, at 467 (2d ed. 1953).

[4]Atkinson, Wills § 90, at 467 (2d ed. 1953).

ever nice the courts may have found this variance in actual practice,[5] the two theories are of independent importance and, happily, both have been recognized, if often confused, by the great majority of American jurisdictions.[6] If a court properly draws the distinction it is easy to see that its decision may be different, or at least based on a different body of law, than it would have been otherwise; and where the distinction is not made clear, it is often difficult to tell whether the court may not be proceeding at least partially on the grounds of both theories at once.[7] It is suggested that this is the course which may have been followed for all practical purposes by the Mississippi court in the noted cases and it is this aberration which may have doubled the significance of what was patently a situation of first impression.[8]

In the instant cases, which differed significantly only in the nature of the alleged defect in the prior instrument, the Mississippi court applied precisely the same body of law. The court referred to a thorough analysis in a legal encyclopedia which contains ample authority for the result reached in each case;[9] and the court explicitly approved the broad rationale for the doctrine of republication set forth in *Taft v. Stearns*,[10] a decision which is basically similar to the noted cases. In that decision, the Massachusetts court seemed to rest its opinion, not only upon the broad rule of codicillary republication which was restated by the Mississippi court, but also upon the doctrine of incorporation by reference, both italicized with the cardinal principle that the testator's intent should be given effect whenever possible. Thus, the Mississippi Supreme Court not only drew no distinction between the two doctrines but also singled out of abundant authority a case which evidently proceeded on both theories at once; and coincidentally there was no case law on either doctrine in Mississippi.[11] A liberal statute,[12] not yet interpreted by the supreme court, was passed by the Mississippi Legislature in 1958 allowing a "pour-over" of property by will into an amendable, revocable trust even where the trust is amended subsequent to the execution of the will. This statute, however, is obviously much more than a mere restatement of some of the elements of incorporation by reference, and incorporation by reference alone could in no way be used to uphold all which the statute allows.[13] Any predictive significance which this statute may have is further diminished by the fact that Connecticut, apparently the only state which flatly rejects incorporation by reference,[14] has a statute which is patterned much more closely upon the doctrine.[15]

If we may draw any valid conclusion from the Mississippi court's

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[5]See Annot., 21 A.L.R.2d 821 (1952).

[6]ATKINSON, WILLS § 80, at 385 (2d ed. 1953); see 2 BOWE & PARKER, PAGE ON WILLS § 23.5, at 578 (new rev. treatise 1960).

[7]See Rogers v. Agricola, 176 Ark. 287, 3 S.W.2d 26 (1928); Taft v. Stearns, 234 Mass. 273, 125 N.E. 570 (1920).

[8]Hogan v. Sillers, 151 So. 2d 411 (Miss. 1963).

[9]Annot., 21 A.L.R.2d 821 (1952).

[10]234 Mass. 273, 125 N.E. 570 (1920).

[11]*But see* Hewes v. Hewes, 110 Miss. 826, 71 So. 4 (1916).

[12]MISS. CODE ANN. § 661.5 (Supp. 1962).

[13]See Comment, 34 MISS. L.J. 199, 208-10 (1963).

[14]See Comment, 27 MISS. L.J. 220, 221 (1956).

[15]See *id.* at 228 n.54.

failure to distinguish between wills which later become invalid and testamentary documents which are originally invalid, in the context of the court's ready acceptance of the doctrine of republication, we must base it on the law in New York, the chief dissenting voice in this specific area[16] and an excellent example of some of the ills which a rejection of incorporation by reference might entail.[17] In New York, a court would probably have reached the same result as was reached in *Alden v. Lewis,* for even the courts of that state have allowed a duly executed instrument, void by reason of undue influence, to be later validated by a freely executed codicil.[18] However, a New York court probably would not have concluded as the Mississippi court did in *Hogan v. Sillers* on the ground that allowing republication of an improperly executed will would have done violence to its holdings forbidding incorporation by reference.[19] *Hogan v. Sillers,* then, would seem to suggest that the supreme court has already detoured a prime opportunity to reject the doctrine, if we may confidently base our opinion on the judicial history in New York. Likewise, there is the authoritative view that, although a court which allows incorporation by reference may with some justification come to the conclusions reached in the instant cases through faulty terminology and reasoning, a court which rejects the doctrine should not allow the same result on the basis of republication.[20] From this angle, any future rejection of the doctrine of incorporation by reference by the Mississippi court would be not only inadvisable, if equity's and history's voices are clear, but would also make the correctness of the instant decisions questionable. And when a situation arises which turns on incorporation by reference alone, it might well be argued, in the same manner, that the court has by necessary implication accepted the doctrine.

Sam D. Knowlton II

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[16]See Annot., 21 A.L.R.2d 821, 824 (1952).

[17]See generally Samuels, *Incorporation by Reference in New York Wills,* 19 N.Y.U.L.Q. Rev. 270 (1942); Comment, 29 Fordham L. Rev. 143 (1960).

[18]Atkinson, Wills § 90, at 467 (2d ed. 1953).

[19]*Id.* at 468.

[20]*Id.* at 467.

Recent Books

FEDERAL TRADE REGULATIONS AFFECTING RETAILERS. Edited by James J. Bliss and Ira M. Millstein. New York: Practising Law Institute, 1963. Pp. 234. $20.00.

Manual of Federal Trade Regulations Affecting Retailers was published jointly by the Practising Law Institute and the National Retail Merchants Association. It was carefully planned and ably edited by James J. Bliss, a member of the New York Bar and counsel of the National Retail Merchants Association and by Ira M. Millstein of the New York law firm of Weil, Gotshal and Manges, each of whom wrote one of the twelve chapters. Each of the other ten chapters was contributed by an attorney, who is a specialist in this branch of the law. Most of these authors serve as instructors in programs for lawyers conducted by the Practising Law Institute.

This manual meets well a growing need on the part of both lawyers and businessmen for a critical analysis and clarification of the basic antitrust statutes and other federal trade regulation laws, as they affect retail trade, particularly its competitive aspects. The giant strides in the development of retailing and the expanding concept of interstate commerce, combined with the upsurge in federal enforcement by both the Department of Justice and the Federal Trade Commission, have accentuated the need for such an analysis of the Sherman Act, the Clayton Act (as amended by the Robinson-Patman and Celler-Kefauver Acts), the Federal Trade Commission Act and federal labeling legislation, such as the Textile Fiber Products Identification Act. Each chapter is adequately footnoted with citations to court and Federal Trade Commission cases. The appendix contains pertinent sections of federal legislation and numerous guides adopted by the Federal Trade Commission.

This volume makes available to both the attorney and the retailer an extremely helpful guide in a dual approach to a formidable body of the law. It outlines the general principles of the law which afford protection to the retailer against restraint of trade, combinations to monopolize, illegal mergers and the various unfair methods of competition, and evaluates the procedures which may be invoked to make effective such protection. Conversely, and more informative to the attorney engaged in general practice, it analyzes the various positive obligations and prohibitions under this body of the law with which the retailer must live; points up the various guides to their interpretation and evaluation; and makes a constructive analysis of practical ways of implementing a program of compliance.

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AN INTRODUCTION TO INTERNATIONAL LAW. J. G. Starke. Washington, D.C.: Butterworth, Inc., 1963. Pp. 524. $9.00.

Within recent years there has developed in the United States an increased interest in international law, arising from an awareness of the interdependence of peoples and the role of America in world leadership. What was once considered a "cultural" subject in our law schools has now become a field of seemingly greater practical significance, as the profession of law is being called upon to make its contribution to America's global destiny. All this is reflected in the increased offerings in international law in the law school curriculum and the specialized studies undertaken in many graduate programs in law.

Starke's *An Introduction to International Law* has little contribution to make to a law school course in international law. It is not written for use as a textbook, nor cast in the usual form of a casebook. While it discusses many of the leading cases in summary fashion, there is no presentation of complete cases in the form familiar to lawyers. Rather, this work is a fundamental treatise which attempts to give no more than an outline of the subject. It perhaps was never meant to be a textbook on a law school level, but it does serve a distinctly different purpose, and serves that purpose well. Within the small compass of some 500 pages, it offers to the non-specialist a handbook, a guide—an introduction. To the busy lawyer in practice it affords a lucid and satisfactory summary. It is a time-saving device to the lawyer whose interest directs him to a particular topic which he will find given in "nutshell" form. Herein lies its contribution to the legal profession. It offers the lawyer an unusually succinct and practical working knowledge of international law.

In the United States, international law is held to have the same binding effect upon our citizens as ordinary law. The Supreme Court has repeatedly recognized that international law is part of the law of the land. As Mr. Justice Gray said in *The Paquette Habana,* "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[1] While the binding force of international law has been repeatedly declared in international conferences, international law remains "weak law." It is still largely customary law. There are no means to compel nations to settle disputes through an international tribunal. In fact, it is difficult to determine in many areas what international law is, and efforts to codify international law, such as at the Hague Conference of 1930, have been pathetically unsuccessful.

In the development of international law, Starke gives due apprecia-

[1] 175 U.S. 677, 700 (1900).

tion to the influence of the natural law, a concept which came down to us from the ancients and which was highly developed by the schoolmen in the medieval period. Starke points to the contemporary influence of the "law of nature" in the recent trend to attempt to bind states by international declarations of human rights. He sees it also as the source of the power to justify the punishment of war criminals. Starke recognizes the great influence of natural law, and to him it is a beneficent influence in that it provides respect for international law and offers a moral and ethical foundation. His approach to international law is a rejection of "positivism" which teaches that the rules of international law are of the same character as municipal or state law in that they too issue from the will of states. The author believes that the fallacy of the positivists rests in their premise that some consensual manifestation must be present to give validity to international law.

The writer represents the newer schools of thought in interpreting what is meant by the term international law. The traditional definition viewed it as a system that governs the relations between states only. The author ranges himself with the broader concept, growing since World War II, which considers international law as rules of law relating to individuals and non-state entities. Thus to the well-recognized sources of international law he would add, as many other recent writers, the decisions of international organizations. But with his realistic approach the author recognizes that international law is still basically a system concerned with the rights and duties of states. It is only in a few cases that the lawyer need consider the individual and non-state entity as subjects of international law. This is not to say that the rights and duties of individuals and non-state entities are not a concern of international law. Such rights and duties under international law are growing in the contemporary world.

Since international law deals primarily with nations, the nature of a state at international law is necessarily given consideration. We think of a state as an entity which has independence and possesses "sovereignty." Sovereignty today, as the author points out, has a much more restricted meaning than in earlier days. "At the present time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most states are members of the United Nations and the International Labour Organization (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a state means the *residium* of power which it possesses within the confines laid down by international law." In this the author sees a resemblance to the early writers on international law. Sovereignty, he considers more "a term of art" than a legal expression capable of precise definition.

Closely associated with our concept of the sovereign state is the doctrine of the equality of states. The necessity of unanimity originally acted as an obstacle to what might be called international legislation. The recent trend, however, has been away from unanimity in such international organizations as the United Nations and the International Labor Organization, where voting is by majority. One exception will be noted and that is the right of the five Great Powers in the Security Council of the United Nations to exercise a veto in matters of substance.

An important restriction on the equality of states may be found in the principle that a state may not use its territory to the injury of a neighbor. This principle of neighborly obligations between states may find difficulty in application in some areas. What is the duty of a state in conducting nuclear experiments on its own territory? The author believes that the better rule is that such a state should give warning or take reasonable precautions to prevent damage from radioactive fallout.

The author's account is up-to-date, and takes due cognizance of recent events. For example, in his treatment of the acquisition of territory the writer treats the "sector principle" in relation to the Arctic and Antarctica which has not become a customary rule. He notes the Treaty on Antarctica signed in Washington in 1959 by seven Antarctic sector states and the United States, the Soviet Union, Belgium, Japan and South Africa to the effect that Antarctica should be used for peaceful purposes only. The treaty provides for freedom of scientific investigation, and the prohibition of nuclear tests there. The treaty further gives all signatories the right of inspection of the entire area.

The timeliness of this revised edition of Starke's work is further demonstrated by his consideration of sovereignty over the air space. The earlier theory which had evident acceptance was *usque ad coelum*, that the subjacent state had sovereignty over the air space to an unlimited height. The great expansion of aviation following World War II posed serious problems as to freedom of air transit and landing rights. The International Civil Aviation Conference of Chicago in 1944 attempted to meet these problems, but much was left undone. In 1946 the United States withdrew from its agreements, indicating that regulation by multilateral agreement was deemed impractical.

Added to these unresolved problems is the very recent one of activities of states in the upper strata of the atmosphere and in outer space. The launching of the first satellite in 1957 by the U.S.S.R. has been followed by American penetration of the cosmos as well as Russian experimentation, preparing the way for still further astronautical navigation. Space law has become a subject of debate. There is as yet no agreement on definite principles, but, at least, there seems to be some measure of agreement on broad principles. For one thing, it is recognized that the old doctrine of *usque ad coelum* is antiquated. It can be

generally agreed that a state for security reasons should exercise sovereignty over the air space appurtenant to it. The question is, how far should this extend. The United Nations General Assembly in 1961 recommended that outer space beyond the limit, whatever that is, should be free for exploration by all states, and that outer space bodies should not be appropriated by any state or used for military aggression. It is generally accepted that a state launching a satellite should give due notice thereof. At the present time, no definite principles are being evolved, for, as the author points out, there are too many unknown elements in the development of astronautical navigation. Apparently, space law can be formulated only by international agreement, and the author is of the belief that this will be accomplished eventually.

The work includes a satisfactory treatment of the standard topics in the field, such as: Recognition, Jurisdiction, Succession, Diplomatic and Consular Agents, Treaties, Disputes between States, the Laws of War, and International Institutions. The chapters are well-organized and are offered in such a clear-cut presentation that the reader is enabled to make a rapid survey of the topics under consideration. For example, the chapter on "The State and the Individual" is broken down into the following: International Importance of Nationality; Acquisition of Nationality; Loss of Nationality; Double Nationality, Statelessness, and Nationality of Married Women; Nationality of Corporations and Unincorporated Associations; Admission of Aliens; Legal Position of Aliens when Admitted; Expulsion and Reconduction of Aliens; Extradition; and Asylum.

The work purports to be an introduction to international law, not an exhaustive treatment. Its aim is to give a succinct and fundamental account. This revised and up-to-date edition admirably achives its purpose.

Sylvester John Hemleben
Associate Professor of Law
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Books Received

SMALL TAX CLIENT PRACTICE. Max Myers. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963. Pp. 132. $10.00.

TAX TESTED FORMS OF WILLS, TRUSTS, AND OTHER FAMILY AGREEMENTS. Compiled by William J. Casey and Institute for Business Planning Staff. New York: Institute for Business Planning, Inc., 1963. Pp. 648. $19.50.

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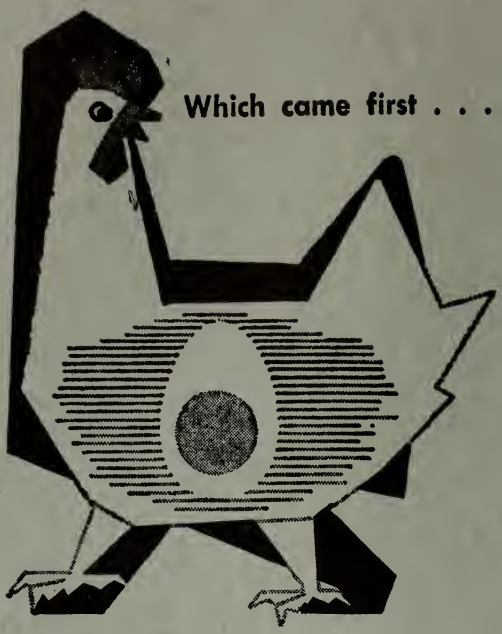

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